

87-688

Supreme Court, U.S.  
FILED

OCT 14 1987

JOSEPH F. SPANIOLO, JR.,  
CLERK

No.

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1987

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HARRY N. ZEMSKY,

*Petitioner,*

—v.—

THE CITY OF NEW YORK; THE BOARD OF EDUCATION  
OF THE CITY OF NEW YORK; VICTOR VILAREAL; ALAN  
IRGANG; JOHN SISTI; ROBERT J. LEVENTHAL; PETER  
ROSENBERG; XAVIER FRANCIS RUGGIERO; LOFTUS NOV-  
ELTY AND MAGIC COMPANY, A CORPORATION; DOE  
ONE; DOE TWO; ETC.,

*Respondents.*

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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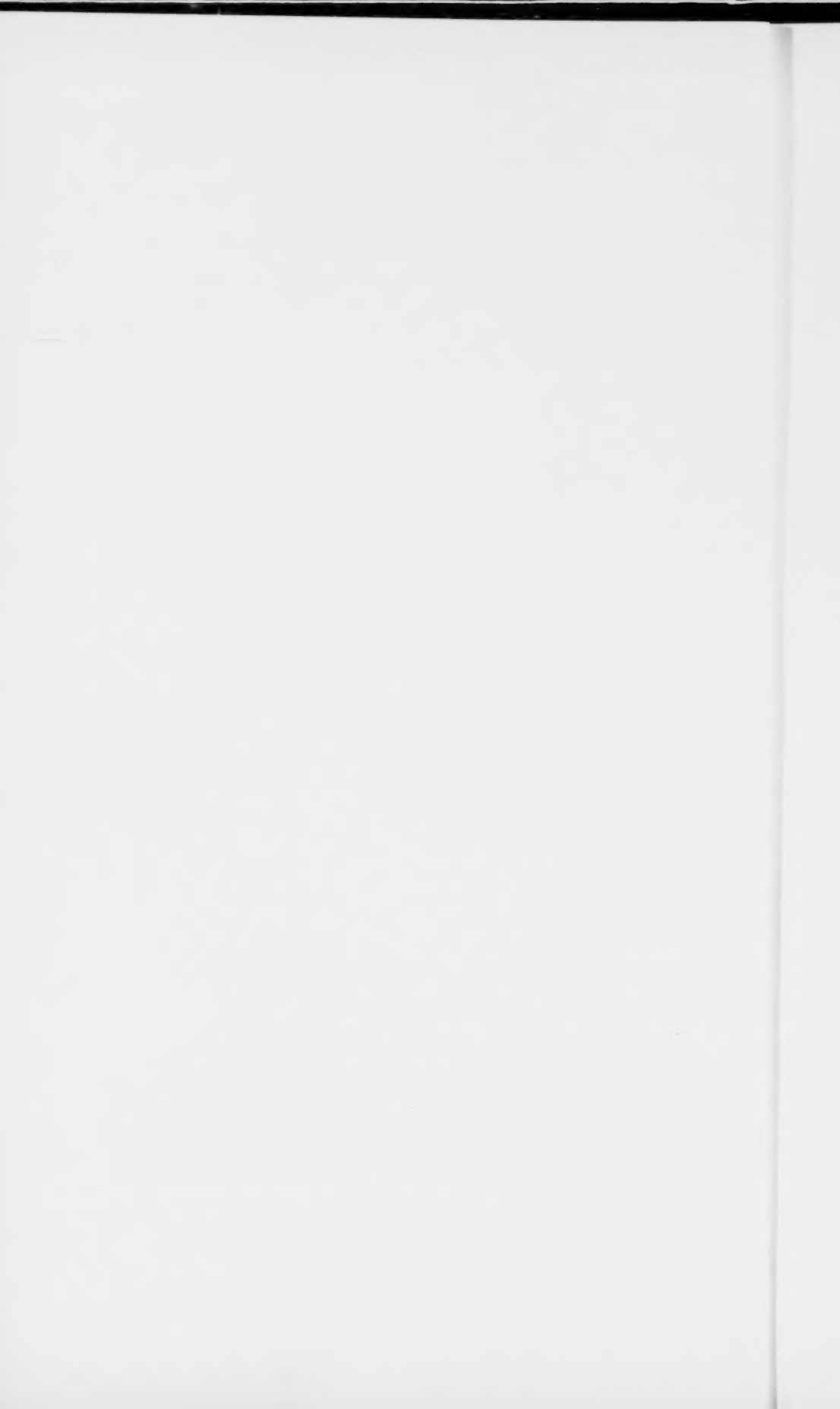
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Brooklyn, New York 11235  
Telephone: (718) 934-7358

October 14, 1987

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QUESTIONS PRESENTED FOR REVIEW

- 1) Is plaintiff entitled to seek relief against Municipal Defendants under the Constitution and Laws of the United States, beyond his liberty interest in freedom from bodily injury?
- 2) Is plaintiff entitled to seek relief under the Constitution and Laws of the United States against the private party defendants in this action?
- 3) Are any of plaintiff's claims time-barred?
- 4) Do injuries and losses suffered by plaintiff consequent to his seeking relief in accordance with the requirements of New York State General

Municipal Law, Article 4: Sections 50-e.1.(a) and 50-i render them violative of provisions of the United States Constitution as amended?

5) What standard of legal expertise may properly be required from a lay plaintiff forced to represent himself?

6) Should plaintiff be granted permission to amend his complaints?

ALL PARTIES ARE NAMED IN THE CAPTION  
FOR THIS CASE

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## THE COURTS BELOW

District Court granted Municipal Defendants motions to dismiss plaintiff's claims under 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1986, except for violation of plaintiff's liberty interest in freedom from bodily injury under § 1983; and on its' own motion dismissed plaintiff's claims against the private party defendants; and further stayed all federal proceedings pending "disposition" of plaintiff's state court action.

Second Circuit Court of Appeals affirmed the dismissal of my claims under 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1986; affirmed dismissal of my claims against the private party defendants; but reversed the District

Court's order that stayed my remaining 1983 claims against the Municipal Defendants, and remanded the case for further proceedings.

GROUND'S ON WHICH JURISDICTION  
OF COURT IS INVOKED

Review is sought of a decision in this case dated June 12, 1987 (the mandate I believe issued on July 3, 1987) of the United States Court of Appeals for the Second Circuit.

On September 8, 1987, Mr. Justice Marshall of the United States Supreme Court signed an order (No. A-192) extending the time for filing a petition for a writ of certiorari in

this case to and including October 9, 1987. (App. 35-36).

On October 7, 1987, I applied for an additional extension of time to file my petition for a writ of certiorari, to and including October 14, 1987. (App. 384-386).

I called the clerk's office (at 5:15 PM, October 13, 1987) and learned that the extension applied for had been granted.

The jurisdiction of the United States Supreme Court in this matter is invoked pursuant to 28 United States Code, Sections 1254(3), and 2101(c).

CONSTITUTIONAL PROVISIONS AND  
LAWS INVOLVED IN THIS CASE

The Constitutional provisions and laws of the United States involved in this case include:

CONSTITUTION OF THE UNITED STATES

ARTICLE I

SECTION 10. (1) No State shall . . .  
impair(ing) the obligation of contracts.

ARTICLE III

SECTION 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States . . .; . . . to controversies between citizens of different States.



## AMENDMENTS

### ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

## ARTICLE V

No person shall . . . be deprived of life, liberty, or property, without due process of law;

## ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . .

## ARTICLE VIII

. . . nor cruel and unusual punishments inflicted.

## ARTICLE IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

## ARTICLE XIV

SECTION 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. SECTION 1332. Diversity of citizenship; amount in controversy; cost

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between . . .

(1) citizens of different States;

28 U.S.C. SECTION 1343. Civil rights  
and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1986 of Title 42 which he had

knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. SECTION 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. SECTION 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit,

purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. SECTION 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. SECTION 1985. Conspiracy to interfere with civil rights

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . ; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to



deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or

Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. SECTION 1986. Action for neglect to prevent conspiracy

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [42 USC § 1985], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representative, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action . . . But no action under the provisions of this section shall be sustained which

is not commenced within one year after the cause of action has accrued.

1) STATEMENT OF THE CASE

Paragraph 7 of my complaint (app. 281) notes "are the results of continuing policies and practices... (app. 282)...to deprive victims...of compensation for injuries and losses...especially when...victim is not represented by an attorney"; is based upon the "NO ATTORNEY" letter (app. 206-207); and notice of claim letter to defendant Irgang (app. 208-209); and forms the basis for the third cause of action in my complaint (app. 291-294).

The above is the heart of this case. Why was the fact that mine was a

"NO ATTORNEY" claim so "IMPORTANT" to the comptroller's office? Was it a recognition of the difficulties I faced in pursuing my claim, and a benevolent suggestion to the Board of Education that it assist me in this matter? Subsequent events demonstrate otherwise.

It was the administrative establishment of an impermissible class composed of victims of official misconduct and mismanagement, forced to seek justice without an attorney, and therefore especially vulnerable to invidious discrimination and denial of due process and equal protection under color of state law; and it was an invitation to the other Municipal Defendants to join a conspiracy to:

- (1) force me to discontinue my efforts to obtain justice;

(2) suppress the true facts of my injuries; and

(3) prepare false evidence that would likely deprive me of compensation for my injuries.

The above led directly to the "conference" (Fourth Cause of Action) (app. 294-297) where defendant Irgang's comments included "...if you claim you're having trouble with your eyes... I don't think someone who can't see should be teaching....think twice if you don't have it so serious....you're going to lose either way...a kid threw something in your face so your eyes are bad.... I don't think a teacher should be teaching with those kinds of physical problems.... So be careful what you say about your physical problems.... You're going to wind up

before the medical board.... I think you understand me very well."

It further places in proper perspective defendant Irgang's false and defamatory letter (App. 200-201); which formed the basis for my Twenty-Second Cause of Action (App. 351-353)

It also explains the preparation of the document "Accident Reports for Mr. Zemsky" (App. 202-205) which formed the basis for my Twentieth Cause of Action (App. 350-351)

The acts of defamation complained of were obviously committed in order to prejudice my chances of recovery in the state court by causing the court to question my veracity and likely cause the court to view my allegations in an unfavorable light.

My allegations of conspiracy are neither vague nor conclusory but are supported by descriptions of numerous overt acts throughout the complaint; e.g. paragraphs 2, 7, 10, 12, 15, 17, 21, 24, 27, 31, 34, 36, 37, 39, 41, 45-47, 49-55, 57-59, 61, 68-71, and 73-78. And their purpose is evident throughout the complaint.

2) Dismissal of the complaint against former student Vilareal is improper. Vilareal assaulted and injured me and willingly joined and participated in the conspiracy by the Municipal Defendants when on May 2, 1983 he stated that his assault upon me was an accident; and on October 3, 1984, (fifteen months after his graduation) he prepared a second false and defamatory statement (App. 199) which



formed the basis for defendant Rosenberg's false and defamatory statement about Vilareal's January 10, 1983 assault upon me (App. 197-198).

Dismissal of the complaint against Loftus Novelty and Magic Company was improper because it is explicitly authorized as a diversity of citizenship controversy, and is a matter of public policy as expressed in the federal consumer product safety laws.

4) The injuries and losses wrongfully inflicted upon me were so clearly a consequence of the submission of a claim within ninety days of injury, as required by New York State General Municipal Law, Article 4 § 50-e.1.(a); and my institution of an action within one year and ninety days, as required by § 50-i of this law, that their

constitutionality under the due process and equal protection provisions of the 14th Amendment is, I believe, in question.

5) As a lay, pro se plaintiff, I prepared my complaints after reading the relevant constitutional and statutory provisions. Is dismissal warranted because I was legally ignorant and inarticulate?

6) On June 30, 1986, I filed a letter in District Court requesting permission to amend my complaints (App. 121). I have received no response, nor was it entered on the docket sheet, nor placed in the case file.

This is of the utmost importance here because:

- 1) Amendment could correct some of the deficiencies noted by the courts below, and
- 2) it would enable me to add causes of action which have accrued but have not been included in my complaint, and furthermore,
- 3) I have been afraid to file new complaints for newly accrued causes of action, because the Municipal Defendants have failed to make a motion regarding new causes of action or complaints, as they had requested and received permission to do. (App. 195-196; 216-218)

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ONE; DOE TWO; ETC.,

*Respondents.*

APPENDIX TO  
PETITION FOR WRIT OF CERTIORARI  
~~(COMMON LAW)~~ *est*  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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October 14, 1987

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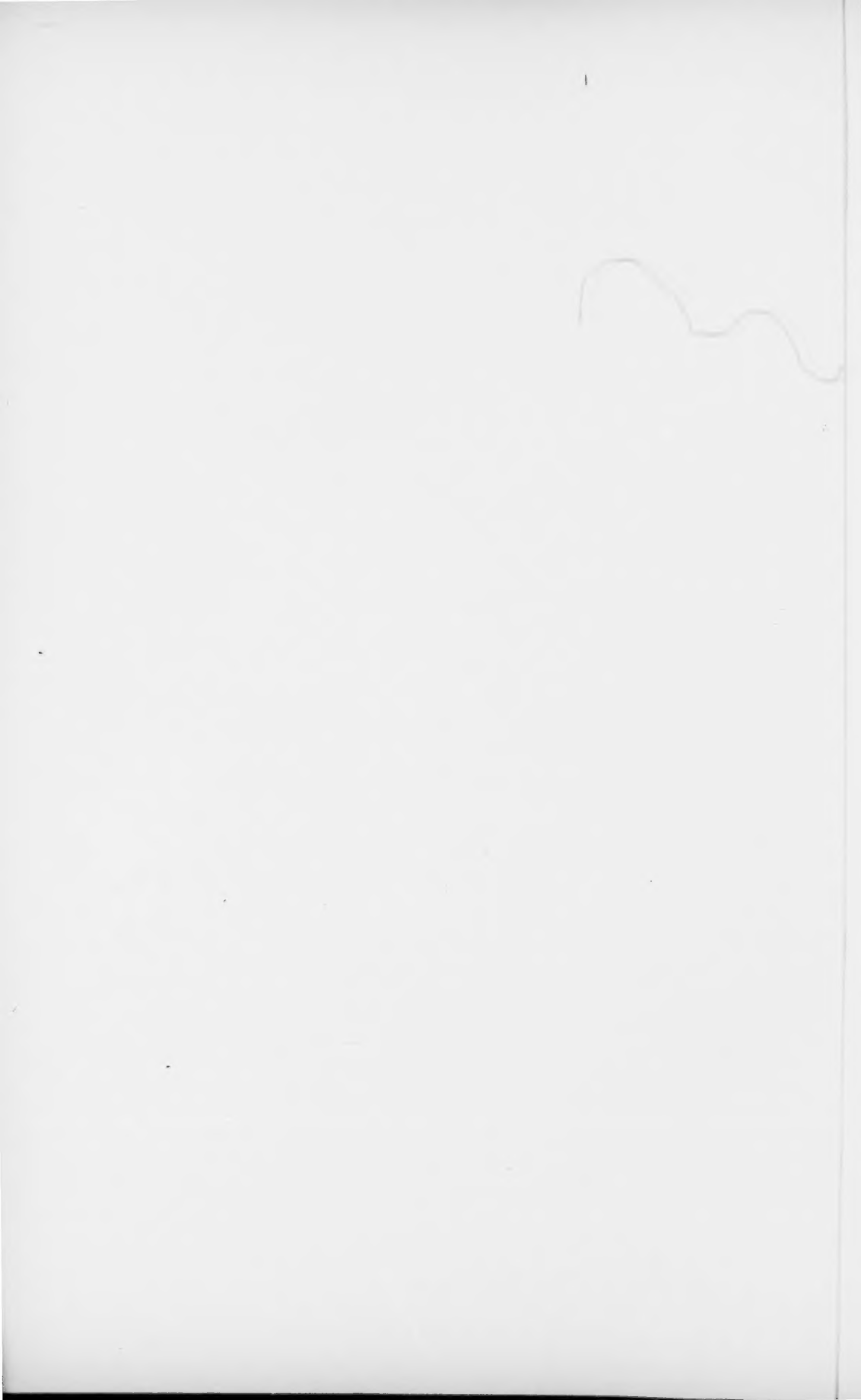


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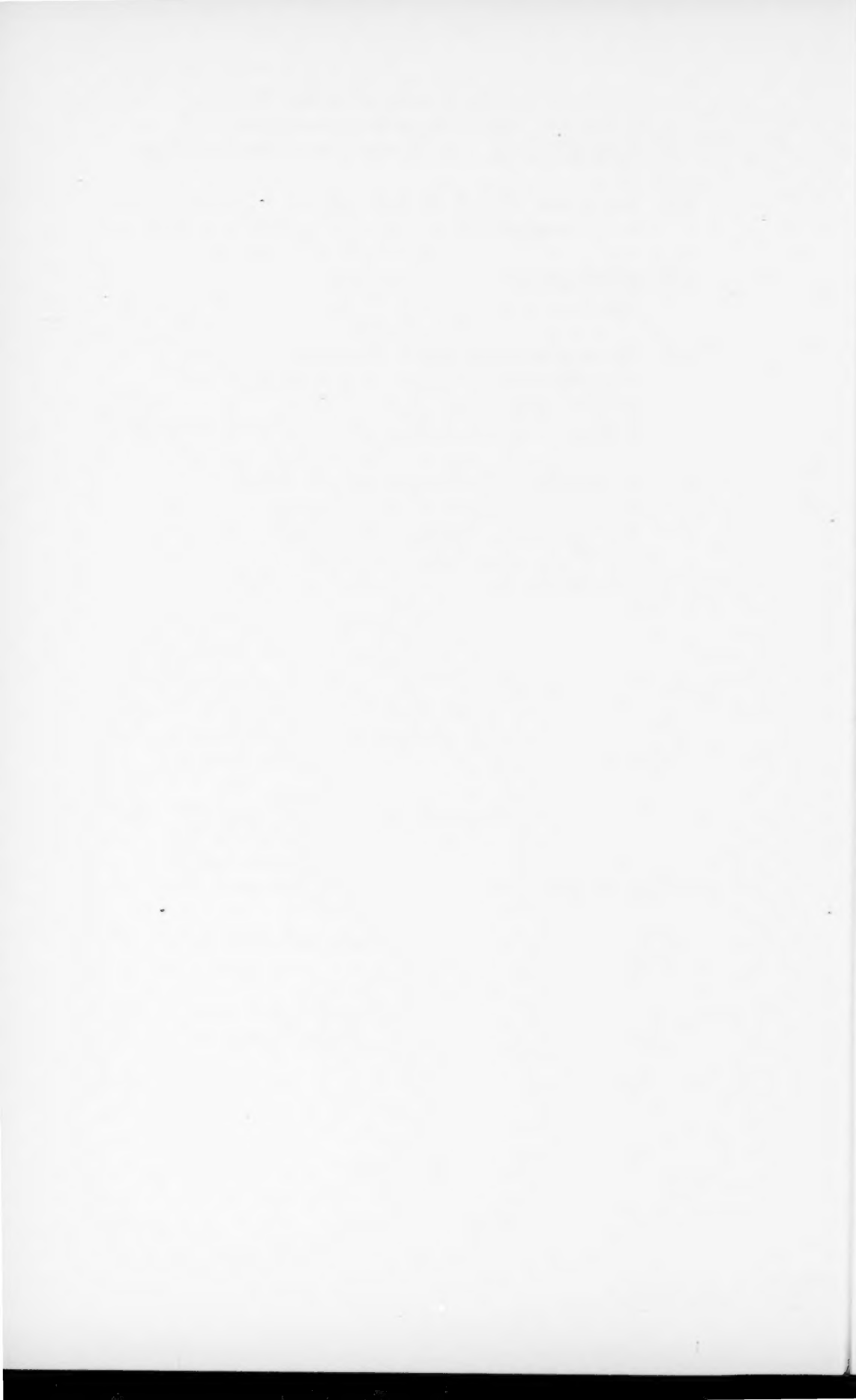


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## UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 855, 856, 857      August Term, 1986

Argued: March 3, 1987

Decided June 12, 1987

Docket Nos. 86-7614, 86-7617, 86-7618

HARRY N. ZEMSKY,

Plaintiff-Appellant

v.

THE CITY OF NEW YORK, THE BOARD OF  
EDUCATION OF THE CITY OF NEW YORK,  
VICTOR VILAREAL, ALAN J. IRGANG,  
JOHN SISTI, ROBERT J. LEVENTHAL,  
PETER ROSENBERG, XAVIER FRANCIS  
RUGGIERO, LOFTUS NOVELTY AND MAGIC  
COMPANY, A CORPORATION, DOE ONE,  
DOE TWO

Defendants-Appellees.

Before: OAKES and WINTER, Circuit

Judges, and ZAMPANO, Senior District

Judge.\*

Appeal from an order of the United States District Court for the Eastern District of New York (Henry Bramwell, Judge) staying certain of plaintiff's claims under 42 U.S.C. § 1983 pending the disposition of related state court proceedings and dismissing the remainder of plaintiff's claims under 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986 and state tort law.

Affirmed in part, reversed in part, and remanded.

HARRY N. ZEMSKY, Brooklyn, New York, pro se

ELIZABETH DVORKIN, New York, New York (June A. Witterschein, Doron Gopstein, Acting Corporation Counsel, New York, New York, of counsel, for Defendants-Appellees.

WINTER, Circuit Judge

Harry Zemsky appeals pro se from Judge Bramwell's order staying certain of his federal claims pending the disposition of related state court proceedings and dismissing the remainder of his federal and state claims. We reverse the stay of certain of his federal civil rights claims against the City of New York, the Board of Education of the City of New York,

and five school officials<sup>1</sup>  
(collectively referred to as "the  
municipal defendants"). We affirm the  
dismissal of his remaining claims.

#### BACKGROUND

Zemsky is a social studies teacher  
employed by the Board of Education at  
the Franklin D. Roosevelt High School  
in Brooklyn. He claims to have suffered  
personal injuries as a result of six  
assaults on him by students at the  
school between June 1982 and November  
1985.<sup>2</sup> His complaint<sup>3</sup> alleges,  
inter alia, that the municipal  
defendants refused to discipline the  
students involved in the assaults,  
failed to provide adequate security at  
the school, conspired to conceal  
evidence relevant to the assaults,  
defamed and harassed him, and  
interfered with his performance as a



teacher. The complaint contends that these actions violated Zemsky's rights under the United States Constitution and various federal civil rights statutes. Zemsky also asserts federal civil rights claims against a former student who allegedly participated in two of the assaults and state product liability claims against the manufacturer of "disappearing ink" that allegedly was squirted into his eyes during one of the assaults.

The municipal defendants moved to dismiss the complaint in its entirety. The district court held that Zemsky had failed to state a claim under 42 U.S.C. §§ 1981, 1982, 1985, and 1986 (1982), because he had not alleged that the defendant's actions were motivated by racial or class-based animus. In addition, the court dismissed Zemsky's

Section 1983 conspiracy claim for lack of specificity and his Section 1983 defamation claim for failure to allege a deprivation of a constitutionally protected liberty or property interest. The court also held that all of Zemsky's Section 1983 claims based on incidents that occurred more than three years before the filing of his complaint were time-barred. Finally, the court dismissed sua sponte all claims against the former student and the "disappearing ink" manufacturer, reasoning that the complaint did not adequately allege any concerted action between these private parties and persons acting under color of state law.

The district court held that Zemsky had stated a viable Section 1983 claim against the municipal defendants for deprivation of his liberty interest in

freedom from bodily harm. The court stayed consideration of this claim, however, pending the resolution of a similar action brought by Zemsky in New York Supreme Court, Kings County, against the City of New York and the Board of Education.

## DISCUSSION

### I

We turn first to the district court's dismissal of Zemsky's claims against the municipal defendants under 42 U.S.C. §§ 1981, 1982, 1985, and 1986.

A plaintiff states a viable cause of action under Section 1981 or 1982 only by alleging a deprivation of his rights on account of his race, ancestry, or ethnic characteristics. Saint Francis College v. Al-Khazraji, 55 U.S.L.W. 4626, 4629 (U.S. May 18, 1987)(§ 1981); Shaare Tefila

Congregation v. Cobb, 55 U.S.L.W. 4629, 4630 (U.S. May 18, 1987) (§ 1982); Runyon v. McCrary, 427 U.S. 160, 167-68 (1976) (§ 1981); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (§ 1982); Keating v. Carey, 706 F.2d 377, 383-84 (2d Cir. 1983) (§ 1981); Glover v. Tower, 700 F.2d 556, 558 (9th Cir. 1983) (§§ 1981, 1982), aff'd on other grounds, 467 U.S. 914 (1984); Landrigan v. City of Warwick, 628 F.2d 736, 739 n.1 (1st Cir. 1980) (§ 1981); DeFrank v. Pawlosky, 480 F. Supp. 115, 118 & n.9 (W.D. Pa. 1979) (§§ 1981, 1982), aff'd mem., 633 F.2d 209 (3d Cir. 1980). A plaintiff states a viable cause of action under Section 1985<sup>4</sup> or 1986 only by alleging a deprivation of his rights on account of his membership in a particular class of individuals. United Brotherhood of

Carpenters & Joiners v. Scott, 463 U.S. 825, 834-35 (1983) (§ 1985(3)); Lowe v. Letsinger, 772 F.2d 308, 311 (7th Cir. 1985) (§ 1985(2), (3)); Glover, 700 F.2d at 558 (§ 1985(3)); Kaylor v. Fields, 661 F.2d 1177, 1184 (8th Cir. 1981) (§§ 1985(3), 1986); Landrigan, 628 F.2d at 739 n.1 (§§ 1985(3), 1986); DeFrank, 480 F. Supp. at 118 & n.9 (§§ 1985(3), 1986).

Because Zemsky did not allege that he was deprived of his rights as a result of any racial, ethnic, or class-based animus on the part of the defendants, the district court did not err in dismissing his claims under Section 1981, 1982, 1985, and 1986.

## II

We turn next to the dismissal of certain of Zemsky's claims against the municipal defendants under 42 U.S.C. § 1983.

The district court dismissed Zemsky's claims that the defendants had conspired to suppress evidence in connection with his state court action on the ground that the complaint "fails to state, with any degree of particularity, the purpose of or any overt acts perpetrated by defendants which reasonably relate to the claimed conspiracies." We have previously held that a pro se complaint "containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss." Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir.) (per curiam), cert. denied, 464 U.S. 857 (1983). We agree that Zemsky's conspiracy claims are so "vague and unsupported by description of particular overt acts," id., as to have

warranted their dismissal by the district court.

The district court also dismissed Zemsky's Section 1983 claims arising out of allegedly defamatory statements by the municipal defendants. The Supreme Court has held that an individual whose reputation is injured by the remarks of a public official, but who suffers no resultant "tangible" injury such as loss of employment as a result of the defamation, is not deprived of a liberty or property interest protected by the due process clause. Paul v. Davis, 424 U.S. 693, 699-710 (1976). Zemsky does not contend that the defendants' allegedly defamatory statements caused him to suffer any such tangible injury. Accordingly, the district court was correct in dismissing his Section 1983 claims of defamation.

The district court dismissed as time-barred Zemsky's Section 1983 claims involving incidents that occurred more than three years before the commencement of this action. This was also correct. See Okure v. Owens, 816 F.2d 45 (2d Cir. 1987).

### III

The district court on its own motion dismissed all claims against Victor Vilareal, the former student who allegedly committed two of the assaults, and Loftus Novelty and Magic Company, the manufacturer of the "disappearing ink" allegedly used in one of the assaults.

A person who is not a government official or employee acts act under color of state law for purposes of Section 1983 when "he has acted together with or has obtained



significant aid from state officials" or has similarly engaged in conduct attributable to the state. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). See also Blum v. Yaretsky, 457 U.S. 991, 1003 (1982) (liability of private party turns on "whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for purposes of the Fourteenth Amendment"). The complaint does not allege that Loftus Novelty acted in concert with or received any significant assistance from the municipal defendants. Furthermore, the complaint makes only vague and conclusory allegations as to any relationship between Vilareal and the municipal defendants. The district court therefore did not err in dismissing Zemsky's Section 1983 claims against the two private defendants.

We also conclude that the district court properly dismissed Zemsky's state law product liability claims against Loftus Novelty. The company's alleged failure to warn can hardly have been a cause of the assault during which the disappearing ink was thrown in Zemsky's eyes. Other allegations concerning Loftus' answers to inquiries about its product are so vague and conclusory as to a causal connection with the harms allegedly suffered by Zemsky that they must be dismissed.

#### IV

The district court relied upon Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), in staying consideration of Zemsky's remaining Section 1983 claims against the municipal defendants. In Colorado River, the Supreme Court

recognized that, while "the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction,'" id. at 817 (quoting McClellan v. Carland, 217 U.S. 268, 282 (1910)), "exceptional" circumstances may on occasion "permit[] the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration." Id. at 818. See also Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 14-16 (1983).

We have previously<sup>1</sup> noted that Colorado River and Cone identify six factors to be considered in assessing whether such exceptional circumstances exist as to warrant a stay or

dismissal<sup>5</sup> of a federal action in  
favor of a concurrent state action:

the assumption by either [the  
federal or the state] court of  
jurisdiction over any res or  
property, the inconvenience of  
the federal forum, the  
avoidance of piecemeal  
litigation, . . . the order in  
which jurisdiction was  
obtained[, ] . . . whether state  
or federal law supplies the  
rule of decision, and whether  
the state court proceeding will  
adequately protect the rights  
of the party seeking to invoke  
federal jurisdiction.

Bethlehem Contracting Co. v.

Lehrer/McGovern Inc., 800 F.2d 325, 327

(2d Cir. 1986). We have also taken  
note of the Court's admonition that the  
decision whether to exercise  
jurisdiction in such circumstances  
"does not rest on a mechanical  
checklist, but on a careful balancing  
of the important factors as they apply  
in a given case, with the balance  
heavily weighted in favor of the

exercise of jurisdiction." Id. (quoting Cone, 460 U.S. at 16) (emphasis added).

Three of the six factors set forth in Colorado River and Cone obviously offer no support for the decision to stay Zemsky's Section 1983 claims. First, neither the state court nor the federal court has assumed jurisdiction over any res or property relevant to this litigation. Second, because both the federal court and the state court are located in Brooklyn, the former is no less convenient to the litigants than the latter. Third, federal law rather than state law provides the rule of decision for Zemsky's Section 1983 claims.

The remaining factors identified in Colorado River and Cone are insufficient to overcome "the heavy presumption favoring the exercise of jurisdiction."

Id. First, in this case, as in Bethlehem Contracting, there is not an identity of defendants in the state and federal actions because the individual school officials are not parties to the state action. Accordingly, staying the federal action does not necessarily avoid piecemeal litigation. See id. at 328.

Second, with regard to the order in which jurisdiction was obtained, the Supreme Court has emphasized that "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." Cone, 460 U.S. at 21. The district court found that the state action was farther advanced than the federal action because "the State Court litigation has been in progress for

almost two years and discovery has steadily progressed." However, as the municipal defendants acknowledge on appeal, the state litigation has not proceeded beyond the noticing of discovery demands. See Brief for Appellees at 10 & n. 6. There is no indication that there has been any response to any such demands. It thus appears that the state litigation has not progressed appreciably farther than the federal litigation.

Finally, while the district court found that the state proceeding would adequately protect Zemsky's rights, we have held that this factor is significant only if it militates in favor of federal jurisdiction. See Bethlehem Contracting, 800 F.2d at 328. It is thus of little weight here. Furthermore, the state

proceeding might not adequately protect Zemsky's rights against those individuals who are parties only to the federal proceeding. See id. at 328-29.

In sum, only one of the factors identified in Colorado River and Cone -- the relative but quite modest progress of the state court action -- offers even a modicum of support for the district court's stay of the instant litigation. Balancing this factor against the five remaining factors, each of which either favors the exercise of federal jurisdiction or is essentially neutral, "with the balance heavily weighted in favor of the exercise of jurisdiction," Cone, 460 U.S. at 16, we conclude that the district court abused its discretion in staying this action.



Accordingly, we reverse so much of the district court's order as stayed Zemsky's remaining Section 1983 claims against the municipal defendants. The case is remanded for further proceedings consistent with this opinion.

## FOOTNOTES

\* The Honorable Robert C. Zampano, Senior United States District Judge for the District of Connecticut, sitting by designation.

1/ Defendant Alan J. Irgang is principal of Franklin D. Roosevelt High School. Defendants John Sisti and Robert J. Leventhal are assistant principals, and defendants Peter Rosenberg and Xavier Francis Ruggiero are deans.

2/ Zemsky asserts that defendant Victor Vilareal threw a liquid in his eyes on June 7, 1982, and squirted "disappearing ink" in his eyes on January 10, 1983; that another student threw a "hard object" at his head on December 13, 1983; that a student shot a liquid at his face from a water gun on June 11, 1985; that a student "assaulted" him on

September 1, 1985; and that two students threw a stink bomb into his classroom on November 22, 1985.

3/ Zemsky filed substantially similar complaints in three separate actions brought in the Eastern District of New York. The district court consolidated the actions on its own motion pursuant to Fed. R. Civ. P. 42(a).

4/ The first clause of Section 1985(2), which prohibits conspiracy to interfere with federal court proceedings, does not require a showing of class-based discrimination. Kush v. Rutledge, 460 U.S. 719 (1983). However, Zemsky has not alleged that the defendants conspired to interfere with any federal proceeding.

5/ The Supreme Court has rejected any distinction between a stay of federal litigation and an outright dismissal

for purposes of the exceptional  
circumstances test. See Cone, 460 U.S.  
at 27-28.

HARRY N. ZEMSKY,

-against-

THE CITY OF NEW YORK, et al.,

DOCKET No. 86-C-99  
86-C-936  
86-C-1437

/S/ Henry Bramwell

DATED: -BROOKLYN, NEW YORK

JUNE 27, 1986

APP. - 24 -

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,  
:

-against-  
:

THE CITY OF NEW YORK, et al.,  
:  
-----x

ORDER

DOCKET No. 86-C-99  
86-C-936 x  
86-C-1437

The above captioned case is hereby  
administratively closed without  
prejudice to reinstatement to the  
active calender upon application to the  
Court.

/S/ HENRY BRAMWELL

U. S. D. J.

DATED: -BROOKLYN, NEW YORK

JUNE 27, 1986

APP.- 25 -

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY, :

-against- :

THE CITY OF NEW YORK, et al., :  
-----x

ORDER

DOCKET No. 86-C-99  
86-C-936  
86-C-1437 X

The above captioned case is hereby  
administratively closed without  
prejudice to reinstatement to the  
active calender upon application to the  
Court.

/S/ Henry Bramwell

U. S. D. J.

DATED: -BROOKLYN, NEW YORK

JUNE 27, 1986

APP.- 26 -

August 14, 1986

Honorable Henry Bramwell  
United States District Judge  
Eastern District of New York  
United States Court House  
225 Cadman Plaza East  
Brooklyn, N.Y. 11201

Re: Zemsky v. City of New York, et al.  
86 Civ. 0099, 0936, 1437 (HB)

Dear Judge Bramwell:

Enclosed for your consideration is a proposed order in the above-referenced action. Also enclosed, for your convenience, is a copy of the transcript of the proceedings held June 27, 1986. I received this transcript approximately one week ago and I have served copies of the transcript and proposed order on Mr. Harry Zemsky, plaintiff pro-se, and Joseph Conklin, Esq., attorney for defendant Lotus Magic and Novelty Co., Inc.



Respectfully submitted,

/S/

Alan M. Schlesinger  
Assistant Corporation  
Counsel

Enclosures

cc: Harry N. Zemsky  
Joseph Conklin, Esq.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff

-against-

THE CITY OF NEW YORK, et al.,

Defendants.  
-----x

ORDER

CV-86-0099 (HB)

CV-86-0936 (HB)

CV-86-1437 (HB)

Defendants, City of New York, Board of Education of the City of New York, Alan Irgang, Robert Leventhal, John Sisti, Xavier F. Ruggiero, and Peter Rosenberg, ("Municipal Defendants") having moved this court for an order dismissing the complaint in its entirety as against Municipal Defendants or, in the alternative, staying all further federal proceedings

with respect to the complaints herein pending disposition of a prior state court action and Municipal Defendants having been represented by their attorney, Frederick A.O. Schwarz, Jr., Corporation Counsel of the City of New York (Alan M. Schlesinger, of counsel) and plaintiff having appeared pro-se and the matter having come on to be heard on June 27, 1986 and due deliberation being had thereon and upon the Court's decision delivered from the bench on June 27, 1986, it is

ORDERED that civil actions numbers CV-86-0099 (HB), CV-86-0936 (HB), and CV-86-1437 (HB) be, and they hereby are, consolidated and it is further

ORDERED, Municipal Defendants' motion to dismiss the complaints herein with respect to

plaintiff's claims pursuant to 42  
U.S.C. sections 1981, 1982, 1985 and  
1986 if granted and it is further

ORDERED that Municipal  
Defendants' motion to dismiss the  
complaints herein with respect to  
plaintiff's claims pursuant to 42  
U.S.C. section 1983 is granted except  
to the extent that the complaints state  
claims, not barred by the statute of  
limitations, for violation of  
plaintiff's liberty interest in freedom  
from bodily injury and it is further

ORDERED that Municipal  
Defendants' motion to dismiss the  
complaints herein with respect to  
plaintiff's claims pursuant to 42  
U.S.C. section 1983 for violation of  
plaintiff's liberty interest in freedom  
from bodily injury is denied and it is  
further

ORDERED that the complaints against the private parties are dismissed in their entirety and it is further

ORDERED that all federal proceedings with respect to the complaints herein are stayed pending disposition of plaintiff's state court action and it is further

ORDERED that the Clerk of the Court is directed to administratively close civil action, numbered CV-86-0099 (HB), CV-86-0936 (HB), and CV-86-1437 (HB).

Dated: New York, New York

August , 1986

S/S Henry Bramwell

U.S.D.J.

OFFICE OF THE CLERK  
SUPREME COURT OF THE UNITED STATES  
WASHINGTON, D.C. 20543

September 9, 1987

Mr. Harry N. Zemsky  
3030 Emmons Avenue  
Brooklyn, New York 11235

Re: Harry N. Zemsky v. City of New  
York, et al., No. A-192

Dear Mr. Zemsky:

Your application for an extension of time within which to file a petition for writ of certiorari and/or for docketing an appeal in the above-entitled case has been presented to Justice Marshall, who on September 8, 1987, signed an order extending your time to and including October 9, 1987.

A copy of the Justice's order is enclosed.

Very truly yours,

JOSEPH F. SPANIOL, JR., CLERK

By:

S/S

Edward L. Turner, Jr.  
Assistant Clerk

th  
Enc.

cc: (Ltr. only) New York City  
Corporation Counsel  
Joseph W. Conklin, Esq.  
Clerk, U.S. Court of  
Appeals for the Second  
Circuit (Your Nos.  
86-7614, 7616, 7618)

SUPREME COURT OF THE UNITED STATES

NO. A-192

HARRY W. ZEMSKY,

Applicant,

v.

THE CITY OF NEW YORK, ET AL.

---

ORDER

---

UPON CONSIDERATION of the  
application of applicant,

IT IS ORDERED that the time for  
filing a petition for a writ of  
certiorari and/or for docketing an  
appeal in the above-entitled cause be  
and the same is hereby, extended to and  
including October 9, 1987.



/s/ Thurgood Marshall  
Associate Justice of the  
Supreme Court of the United  
States

Dated this 8th  
day of September, 1987.

3030 Emmons Avenue  
Brooklyn, New York 11235  
August 31, 1987

Clerk,  
Supreme Court of the United States  
1 First Street, N.E.  
Washington, D.C. 20543

- 1) I am requesting an extension of time to docket an appeal, or apply for a writ of certiorari to the Supreme Court of the United States, from the decision of the U.S. Court of Appeals for the Second Circuit (Docket Nos. 86-7614; 86-7616; 86-7618; dated June 12, 1987; attached).
- 2) I am seeking Supreme Court review of decisions by the District and Circuit Courts which exclude introduction of evidence proving the allegations in my complaints.
- 3) I believe that the decisions by the lower courts:

- a) are in conflict with decisions by the U.S. Supreme Court;
  - b) are in conflict with decisions by other federal courts;
  - c) conflict with the Constitution and laws of the United States and New York State;
  - d) sanction wrongful and unlawful practices by persons acting under color of State laws, effectively making those laws violative of the Constitution and laws of the United States and New York State.
- 4) I am seeking an extension of time to bring these issues before the Supreme Court because:
- a) the necessity of doing so in order to obtain justice became apparent recently;

- b) I will not be able to properly prepare my papers for the Court within the time specified by Statute (28 U.S.C. 2101(c)), or Rules of the Supreme Court (12.1), (date of decision; June 12, 1987; 90 days - September 10, 1987);
- c) As evidenced in the Circuit Court, my efforts to answer defendants' motions have been severely hindered by lack of expertise, unavailability of resources, illness (especially my eyes, injuries to which precipitated this case), and continued misconduct by Municipal Defendants intended to improperly and unlawfully force the termination of this case.

- 5) I note that I have not yet filed a notice of appeal in this matter in accordance with the Rules of the Supreme Court (10.3), because the Court of Appeals here does not accept such appeals. (I hope to sort this out within a few days, and will immediately advise the court.)
- 6) Defendants will not be unfairly prejudiced by this extension.
- 7) I have served copies of this application on the opposing counsel:
- a) New York City Corporation  
Counsel  
100 Church Street  
New York, New York
- and
- b) Joseph W. Conklin, Esq.  
60 Broad Street  
New York, New York

Sincerely,

/s/

---

Harry N. Zemsky, Pro Se  
3030 Emmons Avenue  
Brooklyn, New York 11235  
(718) 934-7358

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff

-against- NOTICE OF MOTION  
Index No. CV-86-0099  
(HB)

THE CITY OF NEW YORK, et al.,

Defendants.

-----x

PLEASE TAKE NOTICE, that upon the Affidavit of Alan M. Schlesinger sworn to April 14, 1986, the Memorandum of Law of Municipal Defendants and upon all prior pleadings and proceedings had herein, Municipal Defendants (City of New York, Board of Education of the City of New York, Alan I. Irgang, John Sisti, Robert Leventhal, Peter Rosenberg and Xavier Francis Ruggiero) will move this Court, on April 25, 1986, at 10:00 a.m., or as soon

thereafter as counsel may be heard, at the Courthouse thereof, 225 Cadman Plaza East, Brooklyn, New York, before the Honorable Henry Bramwell, United States District Judge, for an order dismissing this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and, in the alternative, for an order staying all further federal proceedings in the above-captioned action pending disposition of plaintiff's action presently before the Supreme Court of the State of New York and for such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that in the event that both of Municipal Defendants' motions are denied, Municipal Defendants will move this Court for an order allowing Municipal Defendants twenty (20) days in which to



answer the amended complaint herein pursuant to Rule 12(a) of the Federal Rules of Civil Procedure.

PLEASE TAKE FURTHER NOTICE, that pursuant to the motion rules of the Honorable Henry Bramwell all briefs, memoranda and affidavits in oppositions to these motions shall be served and filed by noon, Tuesday, April 22, 1986.

Dated: New York, New York  
April 14, 1986

FREDERICK A.O. SCHWARZ, JR.  
Corporation Counsel of the  
City of New York  
Attorney for Municipal Defendants  
100 Church Street - Room 6C6  
New York, N.Y. 10007  
(212) 566-3030

By: /S/  
ALAN M. SCHLESINGER  
Assistant Corporation Counsel

To: Clerk of the Court  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, N.Y.

APP.- 44 -

Harry N. Zemsky  
Plaintiff Pro-Se  
3030 Emmons Avenue  
Brooklyn, N.Y. 11235

Loftus Novelty and Magic Company  
Defendant  
865 South 200 East  
Salt Lake City, Utah

-----x  
HARRY N. ZEMSKY,

-against-      Index No. CV-86-0099  
                      (HB)

-----x  
STATE OF NEW YORK )

COUNTY OF NEW YORK )

1. I am an Assistant Corporation Council in the Office of FREDERICK A.O. SCHWARZ, JR., Corporation Council of the City of New York, attorney for defendants City of New York, the Board of Education of the City of New York ("Board of Education"), Alan I. Irgang, John Sisti, Robert J. Leventhal, Peter

Rosenberg and Xavier Francis Ruggiero ("Municipal Defendants"). I submit this affidavit in support of Municipal Defendants' motion for dismissal of the complaint in the above-captioned action and, in the alternative, for a stay of all Federal proceedings in this action or, should both these motions be denied, 20 days in which to answer the complaint.

2. On April 30, 1984, plaintiff commenced an action against the Board of Education in the Supreme Court of the State of New York, County of Kings, alleging that on January 10, 1983 a student threw a liquid into plaintiff's eyes, that on June 7, 1982 the plaintiff was sprayed in the eyes with a liquid by a student while plaintiff was in a classroom at Franklin Delano Roosevelt High School ("FDR"), that

employees of the Board of Education had negligently failed to discipline students and had failed to provide proper security at FDR, that employees of the Board of Education had engaged in a conspiracy to conceal and suppress evidence regarding the aforementioned incidents, that employees of the Board of Education had defamed and libeled plaintiff and that the Board of Education had violated plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to the Consitution. Plaintiff sought \$31 million in damages from defendant Board of Education. A copy of the May 1, 1984 complaint is annexed hereto as Exhibit "A".

3. On May 11, 1984, the defendant Board of Education served an answer with Demand For Bill of Particulars on

Plaintiff. Defendant Board of Education also served a Combined Demand: Notice for Discovery, Inspection and copying on that same date. A copy of the May 11, 1984 Answer, Demand For Bill of Particulars and Combined Demand: Notice for Discovery, Inspection and Copying is annexed hereto as Exhibit "B".

4. On June 6, 1984, defendant Board of Education received an "Amended Complaint" against the Board of Education and the City of New York. The Amended Complaint alleged that the Board of Education had failed to discipline students, had failed to provide proper security at FDR, that employees of the board of Education had conspired to conceal and suppress evidence, that employees of the Board of Education had defamed plaintiff,

that on December 13, 1983 plaintiff was struck in the head by a hard object thrown by a student who was apprehended at the scene, that employees of the Board of Education harassed and threatened plaintiff by advising plaintiff that he might be charged with insubordination and sent to the Medical Division, that Board of Education sought to obstruct justice and that plaintiff was denied both due process of the law and the equal protection of the laws under the Fourteenth Amendment. Plaintiff demanded \$120 million dollars in damages. A copy of the Amended Complaint is annexed hereto as Exhibit "C".

5. On June 22, 1984 defendants Board of Education and City of New York served an Answer, A Demand For a Bill of Particulars and a Combined Demand:

Notice For Discovery, Inspection and Copying. A copy of the Answer, Demand For a Bill of Particulars and Combined Demand: Notice for Discovery, Inspection and Copying is annexed hereto as Exhibit "D".

6. In November, 1985 an "Amended Verified Complaint" was received by defendant Board of Education. This action was alleged to be a "continued complaint by plaintiff" related to plaintiff's April, 1984 complaint described in paragraph "2" herein and annexed hereto as Exhibit "A". In the "Amended Verified Complaint" plaintiff alleged that on or about June 27, 1984, employees of the Board of Education had "maliciously" delayed plaintiff's salary check, that employees of the Board of Education had defamed and harassed plaintiff, that on October 3,



1984, two students had accosted plaintiff while plaintiff was in a classroom at FDR, that employees of the Board of Education concealed evidence and obstructed justice, that employees at the Board of Education failed to discipline students and failed to provide proper security at FDR and that employees of the Board of Education interfered with plaintiff's teaching duties and wrongfully sought to terminate plaintiff's teaching career. Plaintiff reiterated previous allegations regarding the incidents of June 11, 1985 and again alleged violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiff demanded \$720 million dollars in damages. A copy of the Amended Verified Complaint" is annexed hereto as Exhibit "E".

7. On December 10, 1985 defendant Board of Education served an Answer, Demand for a Bill of Particulars and Combined Demand: Notice for Discovery, Inspection and Copying. A copy of these papers is annexed hereto as Exhibit "F".

8. On January 9, 1986, plaintiff obtained a summons in the instant federal action.

9. During March, 1986, the plaintiff served the Municipal Defendants with the summons, the complaint and an amended complaint in the instant federal action. The core of operative facts and the allegations contained in the amended complaint herein are nearly identical to those alleged in the prior state court complaints. See paragraphs "2", "4" and "6" herein and Exhibits "A", "C" and "E" annexed hereto.

10. Several of the allegations in the complaint herein refer to events which occurred more than three years prior to January 9, 1986. See, e.g., paragraphs "9" and "10" of the Amended Complaint. Causes of action arising from events occurring more than three years prior to January 9, 1986 are barred by the three year statute of limitations applicable to Civil Rights actions and should be dismissed for failure to state a claim pursuant to F.R.C.P. 12(b)(6). Wilson v. Garcia, \_\_\_\_ U.S. \_\_\_\_, 105 S. Ct. 1938 (1976).

11. To state a claim against a municipality under section 1983 plaintiff must allege that the acts of the municipal employees were taken pursuant to an official municipal policy, practice or custom. The

amended complaint herein fails to allege that the actions of any of the employees of the Board of Education were pursuant to an official municipal practice, policy or custom.

Plaintiff's section 1983 claims against the Board of Education and the City of New York should therefore be dismissed for failure to state a claim pursuant to F.R.C.P. 12(b)(6). Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).

13. In order to state a claim under section 1982 plaintiff must assert that, due to plaintiff's racial classification, he was denied the right to transfer property. None of the allegations in the amended complaint refer to the right to transfer property. Plaintiff's section 1982 claim must, therefore, be dismissed as

against Municipal Defendants for failure to state a claim pursuant to F.R.C.P. 12(b)(6).

13. Plaintiff does not allege that he is a member of any minority group or other protected class. Plaintiff's sections 1981, 1982, 1985 and 1986 claims should therefore be dismissed for failure to state a claim pursuant to F.R.C.P. 12(b)(6).

14. The complaint fails to allege facts sufficient to show a deprivation of any right protected by the Constitution or laws of the United States. Further, predeprivation hearings would have been impractical in plaintiff's case and postdeprivation state tort remedies are available. Plaintiff is thereby provided with all the process due him under the Fourteenth Amendment. Parratt v.

Taylor, 451 U.S. 527 (1981).

Plaintiff's section 1983 claim should therefore be dismissed pursuant to F.R.C.P. 12(b)(6).

15. The complaint's conclusory allegations of conspiracy are vague and lack the particularity necessary to state a claim under the Civil Rights Act. Plaintiff's conspiracy claims must therefore be dismissed for failure to state a claim pursuant to F.R.C.P. 12(b)(6). See Morpurgo v. Board of Higher Education, 423 F. Supp. 704 (S.D.N.Y. 1976).

16. In the event that the motion for dismissal of the complaint pursuant to F.R.C.P. 12(b)(6) is denied, Municipal Defendants move this Court to stay all further Federal proceedings in this action pending disposition of the prior state court action. There is an

ongoing, two year old, state court action arising from the same core of operative facts which form the basis of the instant complaint. For reasons of judicial economy, the avoidance of piecemeal litigation, the avoidance of duplicative and burdensome litigation, the ability of the state court to comprehensively dispose of the issues presented in the instant litigation and in recognition of plaintiff's choice, nearly two years ago, to commence a state court action, the instant action should be stayed pending disposition of that state court action.

/s/

ALAN MAER SCHLESINGER

Sworn to me this . .  
14th day of April 1986

/s/

---

Notary Public



Index No. CV-86-0099

(HB)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

---

HARRY N. ZEMSKY,

Plaintiff

-against-

THE CITY OF NEW YORK, et al.,

Defendants.

---

MUNICIPAL DEFENDANTS' MEMORANDUM  
OF LAW IN SUPPORT OF THEIR MOTIONS

---

FREDERICK A.O. SCHWARZ, JR.

Corporation Counsel

100 Church Street,

NEW YORK, NY 10007

CARYN M. HIRSHLEIFER,  
ALAN M. SCHLESINGER,  
OF COUNSEL

APP.- 60 -

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff

-against- Index No. CV-86-0099

THE CITY OF NEW YORK, et al.,

Defendants.

-----x  
  
MUNICIPAL DEFENDANT'S  
MEMORANDUM OF LAW IN SUPPORT OF  
THEIR MOTION FOR DISMISSAL AND,  
ALTERNATIVELY, A STAY OF ALL  
FURTHER FEDERAL PROCEEDINGS

Preliminary Statement

Plaintiff, pro-se, brings this action against the City of New York, the Board of Education of the City of New York ("Board of Education"), Alan Irgang, Robert Leventhal, John Sisti, Xavier Francis Ruggiero and Peter Rosenberg ("Municipal Defendants") as well as students at Franklin Delano

Roosevelt High School ("FDR") and the Lotus Novelty and Magic Company under 42 U.S.C. sections 1981, 1982, 1983, 1985, 1986<sup>1</sup> claiming that he was deprived of his federal rights in various ways while plaintiff was a teacher at FDR. Included among plaintiff's claims are deprivations of due process of law, of the equal protection of the laws, negligence in the maintenance of proper security at FDR, negligence in failure to discipline students at FDR, various undefined conspiracies, obstruction of justice and concealing evidence.

Municipal Defendants submit this memorandum in support of their motion to dismiss the complaint against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that: (1) claims arising out of

actions, inactions or conspiracies alleged to have occurred more than three years prior to the filing of the summons and complaint herein are barred by the applicable statute of limitations; (2) claims allegedly arising under sections 1981 and 1982 fail to state a claim since there is not allegation that they are in any manner motivated by racial animus; (3) claims allegedly arising under section 1983 fail to state a claim since the complaint fails to allege a deprivation of any right protected by the United States Constitution or Laws; (4) claims allegedly arising under section 1985 and 1986 fail to state a cause of action since there is no allegation that they are in any manner related to class based animus; and (5) section 1982 is wholly inapplicable to any of the facts specified in the complaint.

In the event that the Court denies Municipal Defendants' motion for dismissal of the complaint, Municipal Defendants move this Court for a stay of all further federal proceedings pending the disposition of plaintiff's state court action commenced in the Supreme Court of the State of New York arising out of the same facts and circumstances which form the core of operative facts in the instant case.

#### STATEMENT OF FACTS

Plaintiff is a teacher employed by defendant Board of Education at Franklin Delano Roosevelt High School ("FDR"). Plaintiff has begun a state court action in the Supreme Court of the State of New York. This action, approximately two years old, arises out of several alleged assaults on plaintiff by several students at FDR and alleged

actions, inactions and conspiracies by employees of the Board of Education in connection with those assaults. In his state action plaintiff has alleged that certain employees of the Board of Education were negligent in the disciplining of students, were negligent in failing to provide proper security in FDR, had defamed plaintiff, had obstructed justice, suppressed evidence, engaged in unspecified conspiracies to injure plaintiff, interfered with plaintiff's proper performance at FDR and violated both the Due Process and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Plaintiff alleges in the instant complaint that he was assaulted several times by several different students at FDR:

1. On June 7, 1982, a student threw an unspecified liquid into plaintiff's eyes;
2. On January 10, 1983, the same student threw what plaintiff believes to be "disappearing ink" into plaintiff's eyes;
3. On December 12, 1983, a second student threw a "hard object" at plaintiff striking plaintiff in the head. The student was apprehended by a school security guard;
4. On October 3, 1984, two students "accost" plaintiff in an unspecified manner in a classroom at FDR.
5. On June 11, 1985, plaintiff was struck in the face by a liquid from a water pistol;

6. On September 11, 1985, another student "assaulted" plaintiff in an unspecified manner; and

7. On November 22, 1985, two students set off an "odor producing device" in plaintiff's classroom.

In addition, plaintiff alleges that the Board of Education and several of its employees made unspecified defamatory and libelous statements at various times regarding plaintiff, were somehow negligent in enforcing school discipline and rules, improperly rated plaintiff's performance, concealed, evidence in an unspecified manner, conspired with the students in an unspecified manner and encouraged student misconduct through improper disciplining of students. Plaintiff further states that employees of the Board of Education stated that



plaintiff might be "charged with insubordination and sent to the Medical Division". Plaintiff also alleges that Municipal Defendants violated his rights to due process of law and to the equal protection of the laws under the Fourteenth Amendment. In paragraph 68 of his complaint plaintiff "notes" that defendants conspired to deprive plaintiff of unspecified federal rights and privileges and immunities.

### ARGUMENT

#### POINT I

PLAINTIFF HAS FAILED TO ALLEGE  
FACTS SUFFICIENT TO SHOW A  
VIOLATION OF A RIGHT PROTECTED  
EITHER BY UNITED STATES CONSTITUTION  
OR A FEDERAL STATUTE AND HIS  
SECTION 1983 CLAIMS MUST THEREFORE  
BE DISMISSED.

Section 1983 protects individuals against deprivations or rights guaranteed either by the United States Constitution or by a federal statute. Baker v. McCollan, 443 U.S. 137, 146 (1979). Section 1983 is not a general tort law and does not remedy all claims which may be cognizable under State tort law. Parratt v. Taylor, 451 U.S. 527 (1981) ("Parratt"). Allegations of mere negligence do not state a claim for relief under section 1983 where the section 1983 claim is grounded in the Due Process Clause, the Equal Protection Clause or the Eighth Amendment's injunction against cruel and unusual punishment. Daniels v. Williams, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 662 (1986); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Estelle v. Gamble, 429

U.S. 97 (1976). Plaintiff's amended complaint has failed to allege facts which, if taken as true, would establish a violation of a federal right and his section 1983 claims must therefore be dismissed pursuant to F.R.C.P. 12(b)(6).

Plaintiff's allegations against Municipal Defendants may, for purposes of analysis, be divided into five categories. First, plaintiff alleges that the Municipal Defendants were negligent in their disciplining of students at FDR and in the maintenance of security at FDR. Second, plaintiff alleges that Municipal Defendant made libelous and defamatory statements regarding plaintiff at various times. Third, plaintiff alleges that Municipal Defendants engaged in an undefined "conspiracy" against plaintiff. Fourth,

the plaintiff states that he is the victim of cruel and unusual punishment. Fifth, plaintiff also states that he has been denied the Equal Protection of the Laws. These claims will be treated seriatim.<sup>2</sup>

The first category of plaintiff's allegations is apparently grounded in the Fourteenth Amendment's Due Process Clause. Plaintiff seems to be attempting to allege deprivations of liberty and property without due process of law. These claims must fail since the complaint alleges mere negligence in failing to properly protect plaintiff from students at FDR. Negligence claims will not serve to establish a violation of the Due Process Clause recognizable under section 1983. Daniels v. Williams, \_\_ U.S. \_\_, 106 S.Ct. 662 (1986); Davidson

v. Connor, \_\_, U.S. \_\_, S.Ct. 668  
(1986) (State prison officials  
negligence in failing to protect prison  
inmate from other inmates not  
cognizable under section 1983).<sup>3</sup>

With respect to the second category  
of plaintiff's allegations, alleging  
libel and defamation, it is clear that  
the facts of this case do not state a  
claim under section 1983. Many of  
plaintiff's allegations in this second  
category of allegations are related to  
statements made to plaintiff by  
employees of the Board of Education.  
Communication to plaintiff of opinions  
regarding plaintiff's conduct do not  
rise to the level of a deprivation of  
liberty without due process of law.  
See Board of Regents v. Roth, 408 U.S.  
564 (1972); Paul v. Davis, 424 U.S. 693  
(1976).

Paul v. Davis establishes that defamation, standing alone, does not deprive an individual of a "liberty" or "property" interest within the meaning of the Fourteenth Amendment's Due Process Clause. There is, therefore, no violation of the Due Process Clause, and no section 1983 claim, in such instances. See Paul v. Davis, 424 U.S. at 712. Plaintiff's "interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law . . . ." Id.

Plaintiff does not contend that "as a result of the state action complained of, a right or status previously recognized by state law has been altered or extinguished." Paul v. Davis, 424 U.S. at 711. It is "this alteration, officially removing a right

or status from the recognition and protection previously afforded by the State, which [the Supreme Court] found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment." Id. Since this necessary "alteration or extinguishment" factor is absent from the instant case, the defamation allegations of the complaint fail to state a claim for relief under section 1983.

Furthermore, any deprivation of liberty which may be occurred as a result of statements made by employees of Municipal Defendants may be remedied by post deprivation tort actions in State court. It would have been impractical, if not impossible, to provide a predeprivation hearing in the instant case with respect to such

statements and a post deprivation hearing is available under state tort law. Plaintiff has, therefore, been provided with all the process due him under the Fourteenth Amendment.

Parratt, 451 U.S. at 541, 543; Hudson v. Palmer, \_\_ U.S. \_\_, 104 S.Ct. 3194 (1984).

The third category of plaintiff's allegations, which broadly alleges the existence of a conspiracy fails to state a claim under section 1983 because these allegations lack sufficient specificity. "[I]n the Second Circuit, complaints based on the conspiracy provisions of the Civil Rights Act cannot rest on vague and conclusory allegations but must allege with at least some degree of particularity overt acts which defendants engaged in which were



reasonably related to the promotion of the claimed conspiracy." Morpurgo v. Board of Higher Education, 423 F. Supp. 704, 713 (S.D.N.Y. 1976), quoting, Powell v. Workmen's Compensation Board, 327 F.2d 131, 137 (2d Cir. 1964). Plaintiff fails to allege the identity of the participants in the conspiracy, the purpose of the conspiracy, what acts are related to the conspiracy and how those acts are "reasonably related to the promotion of the claimed conspiracy." The naked assertion of a conspiracy to violate undefined rights cannot suffice to state a claim under section 1983.

The fourth category of plaintiff's allegations is also spurious. Plaintiff alleges that he was subjected to cruel and unusual punishment in apparent violation of the Eighth

Amendment. Plaintiff is clearly outside the orbit of the Eighth Amendment because plaintiff was not in the custody of the state. Plaintiff also fails to allege that any official of the state, or any individual acting with an official of the state inflicted any "punishment" upon plaintiff.

Estelle v. Gamble, 429 U.S. 97 (1976).

Finally the fifth category of plaintiff's allegations, regarding violations of the Equal Protection Clause also fails to state a claim under section 1983. To state a section 1983 claim grounded in the Equal Protection Clause plaintiff must allege that he was invidiously discriminated against and that he was treated differently from others similarly situated. Plaintiff does not allege that he is a member of any particular

class. Plaintiff does not assert that there is a classification system of any kind established by the government nor does he assert that he is being treated differently from other individuals similarly situated. Furthermore, plaintiff fails to show any intentional deprivations of his right to equal protection under the laws. Daniels v. Williams, supra; Washington v. Davis, 426 U.S. 229 (1976).

Finally, the Supreme Court has held that allegations of an official municipal custom, policy or practice related to the deprivation of plaintiff's rights are necessary in order to state a claim against a municipality under section 1983. The amended complaint herein is completely devoid of any allegations suggesting that the individual defendants acted

pursuant to an official municipal policy, custom or practice of the Board of Education. The plaintiff's section 1983 claims against the City of New York and the Board of Education cannot stand in the absence of pleadings regarding the official policies, customs or practices of both of these defendants.<sup>4</sup> Monell v. New York City Department of Social Services, 436 U.S. 658 (1978); see, also, Pembaur v. Cincinnati, \_\_ U.S. \_\_, 54 U.S.L.W. 4289 (3/25/86); Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983).

For all of the above reasons plaintiff's complaint fails to state a claim for which relief can be granted pursuant to section 1983 and must therefore be dismissed.

## POINT II

PLAINTIFF'S CLAIMS PURSUANT TO  
SECTIONS 1981, 1982, 1985 and 1986  
MUST BE DISMISSED SINCE THERE IS  
NO CLASS BASED DEPRIVATION OF  
PLAINTIFF'S RIGHTS ALLEGED

Section 1981, ensures that all persons will enjoy "the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . " 42 U.S.C. § 1981. This section applies only to racially motivated deprivations of individual rights. Runyon v. McCrary, 427 U.S. 160 (1976).

Deprivations based on the nonracial characteristics of an individual are not remediable under section 1981. *Id.* at 170. In the instant case, plaintiff's complaint is entirely

devoid of any indication that any of the acts complained of were racially connected. In the absence of this essential racial nexus all of plaintiff's claims under section 1981 must be dismissed.

Section 1982 protects an individual's right to inherit, purchase, lease, sell, hold and convey real and personal property. None of the allegations contained in the complaint concern the right to transfer property of any kind and section 1982 is, therefore, wholly inapplicable to the instant case. As with section 1981, allegations of racial causation are necessary to state a claim under section 1982. Plaintiff's claims under section 1982 are fatally defective for failure to allege facts indicating that the acts complained of were racially

motivated. See Georgia v. Rachel, 384 U.S. 780 (1966); Fraser v. Doubleday and Company, Inc., 587 F. Supp. 1284 (S.D.N.Y. 1984). For these reasons the complaint fails to state a claim under section 1982.

Sections 1985 and 1986 protect individuals from conspiracies to deprive them of their rights if the deprivation is motivated by some class based animus. United Board of Carpenters and Joiners of America v. Scott, 463 U.S. 825 (1983). A violation of section 1985 occurs only if the alleged conspiracy is "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . ." Id at 829. While the class need not be

racial in character a relationship based upon a commercial, economic or professional nexus will not suffice to establish the requisite "class" for purposes of sections 1985 and 1986. Id at 838. The complaint in the instant case does not allege membership in a class recognizable under sections 1985 and 1986. Plaintiff's causes of action pursuant to these statutes must therefore be dismissed.

Plaintiff's claims of obstruction of justice refer to alleged interferences with state, and no federal, administration of justice. These claims must, therefore, proceed under the second rather than the first clause of section 1985(2). Plaintiff's failure to allege any class based animus with respect to these claims requires that they be dismissed for



failure to State a claim. See Kush v. Rutledge, 460 U.S. 719, 722-723 (1982).

### POINT III

IN THE EVENT THAT THE MOTION TO DISMISS IS DENIED ALL FURTHER FEDERAL PROCEEDINGS SHOULD BE STAYED PENDING DISPOSITION OF STATE COURT ACTIONS.

While federal courts have jurisdiction over the federal claims alleged in the instant complaint it is "well settled that a district court is 'under no compulsion to exercise that jurisdiction, Brillhart v. Excess Ins. Co., 316 U.S. 491, 494, 62 S.Ct. 1173, 1175, 86 L. Ed. 1620 (1942), where the controversy may be settled more expeditiously in the state court." Will v. Calvert Fire Insurance Co., 437 U.S. 655, 662-663, (1978). "The

decision whether to defer to the concurrent jurisdiction of a state court's discretion." id. at 664. See, also, Colorado River Water Conservation District v. United States, 424 U.S. 800, 818 (1976) ("Colorado River"). The power of the District Court to stay this action is applicable in instances in which a federal section 1983 proceeding parallels a state court action. See, e.g., Kelser v. Anne Arundel County Dept. of Social Services, 679 F.2d 1092 (4th Cir. 1982). The instant controversy, already the subject of an advanced action in the state courts, should be stayed pending a decision of those state court proceeding.

In Colorado River, the Supreme Court held that a stay of federal proceedings may be granted if, in the

discretion of the District Court, the circumstances justify the stay. 424 U.S. at 818-20. The Supreme Court identified factors which should be considered by the District Court including: the avoidance of piecemeal litigation; the convenience of the forum; the order in which jurisdiction was obtained in the state and federal forums; the extent to which the federal proceedings have progressed and the degree to which the issues involved are local in character. Id. See Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) ("Cone"). Cone added two other factors to be weighed in consideration of a stay of federal proceedings: (1) whether federal or state law provided the rule of decision; and (2) whether the state court proceeding will

adequately protect the rights of the parties. 460 U.S. at 23-27. The decision to stay federal proceedings "does not rest on a mechanical checklist, but on a careful balancing of important factors as they apply in a given case, . . ." Cone, 460 U.S. at 16. In the instant case, the dangers of piecemeal litigation are present since there are several advanced state court actions while the federal proceeding is still in the pleadings stage. Furthermore, the state court tort action arises out of the same core of operative facts as the instant federal action. The factual inquiries in both the state and federal actions are nearly identical and involve the same events, persons, places and documents. If both actions are allowed to proceed there will be a complete

duplication of the efforts of all of the parties, witnesses and the courts. The state court action, which has already progressed into the discovery stage, can afford plaintiffs comprehensive and complete relief if the plaintiffs are successful. Considerations of wise judicial economy, avoidance of multiple overlapping litigation and the two year old choice by plaintiff to pursue his tort claims in the state forum require that the federal action be stayed pending disposition of the state claims.

The discretion to stay federal proceedings pending resolution of parallel state proceedings is akin to the District Judge's discretion in setting his calendar. In Will v. Calvert Fire Insurance Co. the Supreme Court recognized that the enormous case

load of the federal courts requires that they be afforded wide latitude with respect to their calendars. 437 U.S. 655 (1978). The Supreme Court, in holding that a writ of mandamus should not issue to force a District judge to hear claims which that District Judge had deferred pending resolution of a contemporaneous state action, stated that:

No one can seriously contend that a busy federal trial judge, confronted both with competing demands on his time for matters properly within his jurisdiction and with inevitability of lawyers, parties, and witnesses, is not entrusted with a wide latitude in setting his own calendar.

437 U.S. at 665.

In a recent case, Arkwright-Boston Manufacturers Mutual Insurance Company v. City of New York, the Second Circuit noted that a failure to stay federal proceedings where a parallel state proceeding has been begun would raise the spectre of multiple inconsistent dispositions which would

breed additional litigation on assertions of claim and issue preclusion. This could burden the parties for years to come. The existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first [which would be] prejudicial, to say the least, to the possibility of reasoned decisionmaking by either forum. Arizona v. San

Carlos Apache Tribe of Arizona, 463

U.S. 545, 103 S.Ct. 3201, 3214, 77

L.Ed 837 (1983).

Arkwright, 762 F.2d 205, 211 (1985).

In this context, it should be further noted that the Supreme Court has held that there is no right to have the federal claims raised in a section 1983 action decided by a federal court.

Migra v. Warren City School District,

104 S.Ct. 892 (1984). The Second

Circuit in Arkwright upheld the grant of the stay citing the Colorado River doctrine, waste of judicial resources, the duplication of effort, the necessity of avoiding piecemeal

litigation, the progress made in the state courts and the substantive rules of law involved. Id. Similar considerations, are present in the instant case together with the fact that plaintiff had chosen a forum.



"A stay in this case will effectively conserve court resources while avoiding premature rejections of the litigants' access, as specified by statute, to a federal forum." Mahaffey v. Bechtel Associates Professional Corporation, D.C., 699 F.2d 545 (D.C. Cir. 1983).

#### CONCLUSION

WHEREFORE, Municipal Defendants respectfully request that the complaint be dismissed, that, in the event that the complaint is not dismissed, all further federal proceedings in this action be stayed pending the disposition of the prior state action and that the Court grant such other and further relief as the Court deems just and proper.

Dated: New York, New York  
April 14, 1986

Respectfully submitted,  
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of New York  
Attorney for Municipal  
Defendants  
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By: /s/  
ALAN M. SCHLESINGER

CARYN M. HIRSHLEIFER,  
ALAN M. SCHLESIGNER,  
Of Counsel

### FOOTNOTES

1. All section references are to United States Code, Title 42, unless otherwise indicated.
2. Plaintiff may be attempting to invoke the pendent jurisdiction of the Court. The amended complaint fails to state a claim upon which relief may be granted, and must therefore be dismissed pursuant to F.R.C.P. 12(b)(6), pendent jurisdiction is unavailable in the instant case.
3. Several of plaintiff's allegations relate to events which occurred more than three years prior to the commencement of the instant action and are therefore time-barred.

Wilson v. Garcia, \_\_\_ U.S. \_\_\_, 105 S.Ct. 1938 (1985); Runyon v.

McCrary, 427 U.S. 160, 179-182 (1976). See, e.g., Amended complaint paragraphs "9" and "10" relating to the June 7, 1982 incident.

4. The Board of Education is not an agency of the City of New York but is rather a separate entity created by the State of New York. See New York Education Law §§ 2550 et seq. The City of New York cannot therefore be held responsible for the actions of the Board of Education and, since none of the allegations in the complaint relate to actions, inactions or conspiracies by the City of New York its agents or employees, all complaints against the City of New York should be dismissed.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff

-against-

CV-86-0099

THE CITY OF NEW YORK, et al.,

Defendants.  
-----x

United States Courthouse  
Brooklyn, New York

June 27, 1986  
10:00 o'clock a.m.

B E F O R E:

HONORABLE HENRY BRAMWELL, U.S.D.J.

PERRY AUERBACH  
Official Court Reporter

A P P E A R A N C E S:

HARRY N. ZEMSKY  
Plaintiff, pro se

FREDERICK A. O. SCHWARZ,  
Corporation Counsel of the City of  
New York  
Attorneys for Defendants

APP.- 96 -

BY: ALAN M. SCHLESINGER, ESQ.  
Assistant Corporation Counsel

THE CLERK: Zemsky versus the City of New York.

MR. SCHLESINGER: Good morning, your Honor.

THE COURT: Yes, Sir.

MR. ZEMSKY: I'm Harry Zemsky, the plaintiff.

THE COURT: Anything additional that you might care to say, Mr. Zemsky?

MR. ZEMSKY: Well, I came here on the chance that a corporation counsels office would be here. I have not submitted my answer to their motions yet and I haven't been able to be fully prepared. I've had ample time certainly but there have been a lot of things that have been happening and they have kind of --

THE COURT: You're representing yourself aren't you?

MR. ZEMSKY: Yes.

THE COURT: I've gone over the papers. I don't know if there's much additional that might be added. In fact, I have a decision on the matter unless there's something that should otherwise be done.

MR. ZEMSKY: Well, I don't know what your decision is. I went over the papers myself, obviously, and my answer would pretty simply point out that the affidavit and Memorandum of Law that they submitted in support of their motions were personally based upon misstatements in the complaint itself.

For example, they keep using the term negligence, negligence, et cetera. I went through that three times and I could not find it there. They tried to apparently make a negligence case out of this and to make it properly belong in the State Court.



But this is a civil rights issue based on a U.S. Code, what is it, 1981, '82, '83, '85, and '86.

I'm obviously not an attorney, so I had a great deal of difficulty getting the information.

THE COURT: Is anybody in the State Court -- are you representing yourself there?

MR. ZEMSKY: Yes. The State Court proceeding, despite what the Corporation Counsel has said, hasn't gone anywhere. They're much more advanced there. I've never really spoken to corporation counsel on that issue. I filed the complaints and the summons, et cetera, primarily to preserve my rights under the statute of limitations.

THE COURT: What I may do, Mr. Zemsky, at this point the Court has

gone over the papers and I may put the Court's opinion on the record and it will be of assistance to you and to the corporation counsel and it will help this thing to move under the circumstances. So you be seated right there and you can be seated.

MR. SCHLESINGER: Thank you, your Honor.

THE COURT: All right.

Plaintiff Harry N. Zemsky, pro se, has commenced three related actions against the City of New York, the Board of Education of the City of New York, and several of its employees, certain students at Franklin Delano Roosevelt High School, and the Lotus Novelty Company purporting to allege violations of the federal constitution, various federal civil rights laws, and the New York State tort law.

This morning the municipal defendants (the City, the Board of Education and individual defendants Irgang Leventhal, Sisti, Ruggiero and Rosenberg), move to dismiss the complaint in civil action 86-99 on various grounds pursuant to Rule 12(b) Federal Rules of Civil Procedure.

In the event the Court denies all or part of the motion to dismiss, the municipal defendants further request that federal proceedings be stayed pending a disposition of a related case filed by the plaintiff in State Court.

Although plaintiff expressed a desire to respond to these motions, and was given several opportunities to do so, no opposition has yet been received by the Court. The relevant facts are as follows:

Plaintiff is a teacher employed by the Board of Education at FDR High School in Brooklyn. On April 30th, 1984 plaintiff commenced a civil action against the Board of Education and the City in the Supreme Court of the State of New York alleging that he had been assaulted by students on three separate occasions and that employees and officials of the school refused to discipline the offending students, failed to provide adequate security or to consider legitimate grievances, defamed and abused him, obstructed justice, suppressed evidence, conspired against him, and interfered with his performance as a teacher. The assaults referred to in the state complaint allegedly occurred on June 7th, 1982, January 10th, 1983 and December 13th, 1983. Most of the allegations in

plaintiff's state complaint sound in tort; however, plaintiff also alleges that the defendants' repeated acts of misconduct were intended to deprive him of life, liberty and property with due process and equal protection of the laws in violation of the 14th Amendment of the United States Constitution.

Plaintiff subsequently amended his state complaint on two occasions to add allegations of additional assaults on October 3rd, 1984 and June 11th, 1985 and of further efforts to harass him.

On January 9th, 1986, plaintiff filed civil action 86-99, with this Court in which he restates in somewhat greater detail the tortious conduct he alleged in the state action. He realleges the facts surrounding the five assaults listed in the state complaint and further alleges that he

was again assaulted on September 11th and November 22nd, 1985, and that defendants conspired to impede the progress of his state action.

Plaintiff asserts that federal jurisdiction is based on 42 U.S.C. Sections 1981, 1982, 1983, 1985, 1986. However, specific violations of his federal rights are mentioned only in two of the 76 paragraphs of the complaint. In paragraph 50, plaintiff states that " inasmuch as the injuries and losses wrongfully caused the plaintiff were inflicted under color of law... [they] were intended to deprive the plaintiff of life, livelihood and property without due process of law; and, furthermore, were intended to deny plaintiff equal protection of the laws, and to obstruct plaintiff's efforts to obtain justice." In paragraph 51

plaintiff asserts that defendants' actions violated the 14th Amendment to the constitution.

Subsequently, plaintiff opened two additional federal cases designated respectively as civil action 76-936 and 86-1437 . The complaints in these actions are identical to civil action 86-99, except that plaintiff changed the language in several of the paragraphs, and alleges additional tortious acts by defendants John Sisti, Alan Irgang, and the City.

The municipal defendants have moved to dismiss the complaint in 86-99 on several grounds. They contend that:

One, claims arising out of the actions or inactions alleged to have occurred prior to January 9th, 1983 are time-barred by the applicable three year statute of limitations;.

Two, claims allegedly arising under sections 1981 and 1982 fail to state a claim since there is no allegation that they were initiated by racial animus;

Three, claims arising under 1985 and 1986 fail to state a course of action because there is no allegation that they are related to class base animus, and;

Four, claims allegedly arising under Section 1983 fail to state a claim because mere negligence cannot work as a violation of constitutionally protected rights. Since the three federal suits instituted by plaintiff clearly involve common questions of law and fact, the Court, on its own motion consolidates the cases pursuant to Rule 42(a) of the Federal Rules of Civil Procedure and considers the municipal defendants' motions as applying to all



three actions. Additionally, the Court on its own motion considers whether plaintiff has stated a cause of action against the private party defendants.

Turning first to the arguments raised by the municipal defendants, the Court concludes, after careful study of the three complaints, that it is in agreement with all of defendants' arguments except the last. Defendants correctly assert that plaintiff has failed to state any claim under sections 1981, 1982, 1985 or 1986. Sections 1981 and 1982 apply only to racially motivated deprivations of individual rights, while sections 1985 and 1986 protect individuals from conspiracies to deprive them of their rights if the deprivation is motivated by some class based animus. Here, plaintiff makes no allegations in any

of his complaints, that defendants' actions were racially motivated or class-based. Thus, plaintiff fails to state a claim under any of these sections.

Defendants are also correct in several of their attacks on plaintiff's section 1983 claims. First, plaintiff alleges that defendants engaged in a conspiracy to injure plaintiff by destroying, concealing and suppressing evidence in connection with plaintiff's state court action. As defendants contend, this claim fails because it lacks specificity. In this Circuit, civil rights conspiracy allegations must be supported by more than vague and conclusory statements. Although plaintiff alleges the existence of various conspiracies, he fails to state, with any degree of

particularity, the purpose of or any overt acts perpetrated by defendants which reasonably relate to the claimed conspiracies. Plaintiff's naked assertions regarding various conspiracies do not suffice to state a claim under Section 1983.

Second, as defendants point out, plaintiff may not state a claim under Section 1983 based on plaintiff's alleged libelous and slanderous statements. In Paul against Davis, the Supreme Court held that defamation alone does not deprive an individual of a liberty or property interest within the meaning of the 14th Amendment. Plaintiff's interest in reputation, the Court noted, is simply one of a number of interests which the state may protect against injury by virtue of its tort law. Thus, any deprivation which

may have occurred to him as a result of the alleged defamation may be corrected by the post-deprivation remedies provided by this state.

Finally, the applicable statute of limitations in a Section 1983 suit is three years. Thus, defendants argue, plaintiffs claims may not be based on acts which occurred prior to January 9th, 1983.

Even though plaintiff's Section 1983 claim is deficient in the above stated ways, the Court cannot agree with defendants that plaintiff's Section 1983 claim is totally lacking in merit. Plaintiff has a liberty interest in freedom from bodily injury. He alleges that this interest was violated by defendants' failure to protect him from student assaults and

to properly discipline the students involved in the assaults.

Defendants' argument that the due process clause is not implicated by negligent conduct ignores the fact that plaintiff repeatedly asserts that defendants' actions were intentional.

Consequently, Daniels against Williams, the recent Supreme Court case cited by defendants, is not controlling.

Thus, the Court must conclude that plaintiff has stated a viable Section 1983 claim against the municipal defendants. The same cannot be said, however, of plaintiff's allegations against the private party defendants, the students at FDR and Lotus Novelty & Magic Co., the manufacturer of disappearing ink which was allegedly squirted into plaintiff's eye in one of the assaults. In order for a valid

claim to be stated under Section 1983 against a private party, the plaintiff must allege, in sufficient detail, a conspiracy between the private parties and persons acting under color of state law. As stated above, plaintiff's allegations of conspiracy are vague and conclusory. Therefore, no claim is stated against the private parties.

Having narrowed the federal issues raised by plaintiff in his federal complaint to a single cause of action under Section 1983 the Court must now address defendants' requests that federal proceedings be stayed pending disposition of the state action. In Colorado River Water Conservation District against the United States, the Supreme Court announced a narrow exception to the duty of a Federal Court to exercise the jurisdiction

granted to it. In the interest of "wise judicial administration" a Federal Court may sometimes decline to proceed with a case properly before it when parallel litigation is pending. Here, the state action is parallel because it evolves out of the same facts as the federal actions. In both actions, plaintiff raises predominantly state law tort claims and adds almost, as a postscript, that defendants' actions violated his federal rights. The federal allegations in the state action are only slightly less specific than those raised here. Moreover, the fact that the individual defendants are not named in the caption of the state suit is inconsequential. The state complaint alleges the same claims involving the same defendants named in the federal complaints and, thus, could

be easily amended to include the individual municipal defendants.

Under Colorado River, abstention is proper only in exceptional circumstances after consideration of a number of factors. In applying these factors to the cases at hand, the Court believes there are sufficient grounds to impose a stay. First, the State Court litigation has been in progress for almost two years and discovery has steadily progressed. In contrast, the federal suits have not advanced beyond the pleadings and the motion to dismiss.

Second, proceeding with these actions will result in piecemeal litigation. The state and federal actions are nearly identical, requiring the same witnesses to be called in both proceedings. Maintaining suits in two



forums will therefore waste judicial resources and invite duplicative effort.

Third, plaintiff's complaints raise predominantly State law issues. Because plaintiff has stated a Section 1983 claim, the Court could hear the State law claims under the doctrine of pendent jurisdiction. But, since these claims could not be brought here in their own right, this Court's jurisdiction is secondary to the State's on the pendent claims. Moreover, jurisdiction over Section 1983 claims is not exclusively vested in the federal courts. Thus, the presence of a federal issue does not require that the Court retain its jurisdiction. In this case, the source of law factor weighs in favor of a stay.

Finally, the State Court action can adequately protect plaintiff's rights.

As stated above, state courts have concurrent jurisdiction. Moreover, since the state action was filed almost two years before the first federal action, some of the claims which are time-barred here are viable in state court. In sum, these laws fall within the framework of the exceptional circumstances test. Upon careful balancing of the relevant factors, the Court concludes that the three federal actions must be stayed pending disposition of the State Court action.

Accordingly, the motion to dismiss of the municipal defendants is GRANTED as to plaintiff's claims under 42 U.S.C. sections 1981, 1982 and 1985 and 1986, but DENIED as to plaintiff's claim under 42 U.S.C. Section 1983. On the Court's own motion, the complaint

is DISMISSED in its entirety as against the private defendants.

Finally, the motion of the municipal defendants to stay the remaining claims against them is granted. The Clerk of the Court is directed to administratively close civil actions numbers 86-99, 86-936, and 86-1437 pending further order of the Court.

The Corporation Counsel is instructed to order a copy of the Court's decision from the reporter and to provide the plaintiff with a copy of the Court's decision.

MR. SCHLESINGER: Thank you, your Honor.

THE COURT: Perfectly welcome. You'll get a copy of the decision.

MR. SCHLESINGER: I will serve that within a week of receipt.

THE COURT: Yes, sir.

MR. ZEMSKY: I should add that just yesterday I filed a fourth federal case.

THE COURT: Filed one yesterday?

MR. ZEMSKY: Yes. Because I've been trying to catch the --

THE COURT: I'll look at it.

MR. ZEMSKY: I did not include all the causes of action.

THE COURT: I will look at it, Mr. Zemsky. Have a nice day.

MR. SCHLESINGER: Would your Honor want me to submit separate papers on the new claim or should I have a motion to consolidate?

THE COURT: Let me look at it. You can speak with Ms. Gallagher.

MR. SCHLESINGER: Thank you very much, your Honor.

THE COURT: Thank you.

(Matter concluded.)

3030 Emmons Avenue,  
Brooklyn, New York 11235  
June 26, 1986.

Honorable Henry Bramwell  
United States District Judge  
Eastern District of New York  
United States Court House  
225 Cadman Plaza East  
Brooklyn, New York

Re: Zemsky v. City of New York et al.  
CV-86-0099 (HB)

Dear Judge Bramwell,

I am the plaintiff in this case. I  
request permission of the Court for  
additional time to submit my answer in  
opposition to Municipal Defendants'  
Motion of April 14, 1986 for dismissal  
or stay of this case.

Respectfully submitted,

/s/

Harry N. Zemsky, Pro Se

cc. Alan M. Schlesinger  
Assistant Corporation Counsel  
Law Department  
City of New York  
100 Church Street  
New York, New York 10007

3030 Emmons Avenue,  
Brooklyn, New York 11235  
June 29, 1986.

Honorable Henry Bramwell  
United States District Judge  
Eastern District of New York  
United States Court House  
225 Cadman Plaza East  
Brooklyn, New York

Re: Zemsky v. City of New York et al.  
CV-86-0099; CV-86-0936; CV-86-1437

Dear Judge Bramwell,

I am the complainant in this case.

I request the Court's permission to  
amend the above noted complaints. This  
request is made pursuant to Rule 15 of  
the Federal Rules of Civil Procedure.  
I believe that the provisions of Rule  
15 apply to this request.

Respectfully submitted,

/s/

Harry N. Zemsky, Pro Se

cc. Alan M. Schlesinger  
Assistant Corporation Counsel  
Law Department  
City of New York  
100 Church Street  
New York, New York 10007  
APP.- 121 -

86-7614, 86-7616, 86-7618

To be argued by  
ELIZABETH DVORKIN

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
HARRY N. ZEMSKY,

Plaintiff-Appellant

-against-

THE CITY OF NEW YORK, THE BOARD OF  
EDUCATION OF THE CITY OF NEW YORK,  
VICTOR VILAREAL, ALAN J. IRGANG, JOHN  
SISTI, ROBERT J. LEVENTHAL, PETER  
ROSENBERG, XAVIER FRANCIS RUGGIERO,  
LOFTUS NOVELTY AND MAGIC COMPANY, A  
CORPORATION, DOE ONE, DOE TWO,

Defendants-Appellees

-----x

ON APPEAL FROM AN ORDER OF THE UNITED  
STATES DISTRICT COURT FOR THE EASTERN  
DISTRICT OF NEW YORK

APPELLEES' BRIEF

DORON GOPSTEIN  
Acting Corporation Counsel  
Attorney for Defendants-  
Appellees,  
100 Church Street,  
New York, New York 10007  
(212) 566-8686 or 6037  
APP.- 122 -

ELIZABETH DVORKIN,  
JUNE A. WITTERSCHEIN,  
of Counsel.

January 29, 1987

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

HARRY N. ZEMSKY,

Plaintiff-Appellant,

-against-

CITY OF NEW YORK, THE BOARD OF  
EDUCATION OF THE CITY OF NEW YORK,  
VICTOR VILAREAL, ALAN J. IRGANG, JOHN  
SISTI, ROBERT J. LEVENTHAL, PETER  
ROSENBERG, XAVIER FRANCIS RUGGIERO,  
LOFTUS NOVELTY AND MAGIC COMPANY, A  
CORPORATION, DOE ONE, DOE TWO,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE  
UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF NEW YORK

---

APPELLEES' BRIEF

---

PRELIMINARY STATEMENT

Plaintiff appeals pro se from the judgment in three related civil rights actions. The District Court (Bramwell, J.) dismissed plaintiff's claims under 42 U.S.C. §§ 1981, 1982, 1985 and 1986 and stayed plaintiff's section 1983 claim under Colorado River Water Conservation District v. United States, pending the outcome of related state court proceedings.

The actions arise out of a number of allegedly harassing attacks on plaintiff, a high school teacher, by students. The actions were consolidated for the purpose of

briefing and argument by order of this Court dated September 30, 1986.

#### QUESTIONS PRESENTED

1. Whether plaintiff's claims under sections 1981, 1982, 1985 and 1986 were properly dismissed?

2. Whether the District Court properly applied Colorado River in staying the section 1983 claims pending the outcome of related state court proceedings?

#### STATEMENT OF FACTS

Plaintiff is a teacher employed by the New York City Board of Education at the Franklin Delano Roosevelt High School ("FDR") (51).<sup>1</sup> His complaint,<sup>2</sup> filed on January 9, 1986, alleges that he suffered physical injuries from six assaults by students. The complaint alleges one student threw a liquid in plaintiff's

eyes on June 7, 1982 (70, paragraph 9); the same student threw "disappearing ink" in plaintiff's eyes on January 10, 1983 (71, paragraph 11); a student threw a "hard object" at plaintiff's head on December 13, 1983 (76, paragraph 19); a student shot a liquid at his face from a water gun on June 11, 1985 (87, paragraph 43); a student "assaulted" plaintiff on September 1, 1985 (93, paragraph 57); and, on November 22, 1985, two students threw a stink bomb into his classroom (94, paragraph 58).

The complaint alleges that the defendants improperly refused to discipline the students, defamed him, concealed evidence, harassed him, and interfered with his teaching (51-52). The complaint alleges that these actions deprived plaintiff of his

constitutional rights under 42 U.S.C. §§ 1981, 1982, 1983, 1985 and 1986 (52, 90). Plaintiff asked for more than one billion dollars in damages in his three complaints.

The municipal defendants moved to dismiss the complaint on April 14, 1986. They argued that claims under sections 1981 and 1982 should be dismissed because plaintiff did not allege any racially motivated deprivation of rights (53-54). The claims under sections 1985 and 1986 should be dismissed, the municipal defendants argued, because plaintiff did not allege any class based deprivation of rights (54).

The municipal defendants argued that the section 1983 claims should be barred for several reasons. Those claims arising more than three years

before the complaint was filed on January 9, 1986 were time barred; the claims against the Board of Education and the City of New York should be dismissed because no official practice or policy was alleged; the conspiracy claims were too vague and conclusory to state a claim; to the extent plaintiff alleged negligence or defamation he failed to state a claim under Daniels v. Williams and Paul v. Davis; and, plaintiff had adequate tort remedies for these claims in state court (23-25). The municipal defendants requested that if the Court did not grant the motion to dismiss in its entirety, that the court stay the federal action pending the outcome of the related state court proceedings (25).

The municipal defendants attached as exhibits to their moving papers three complaints plaintiff filed in New York State Supreme Court, Brooklyn County (22-23). The first complaint was filed on April 30, 1984 (52). The complaints make the same allegations as the federal complaint except that they do not include the student assault on September 11, 1985 or the stink bomb on November 22, 1985 (52). Also attached as exhibits to the motion to dismiss were the various answers, demands for a bill of particulars, and combined demands for discovery, inspection and copying that defendants filed in response to the state court complaint (22-23).

Plaintiff was given several opportunities to respond to the motion to dismiss but he failed to do so (51, 223).



The Court announced its decision on June 27, 1986 (46). The Court dismissed all claims under sections 1981, 1982, 1985 and 1986 (6). The Court refused to dismiss the section 1983 claims that were not time barred and that alleged deprivation of plaintiff's liberty interest in freedom from bodily injury (6). However, the Court stayed these claims pending the outcome of the state tort proceedings (6, 60-61). The Court, on its own motion, dismissed the complaint against the private defendants (6, 60).<sup>3</sup>

#### OPINION BELOW

In announcing his decision, Judge Bromwell read his opinion into the record. The Court explained that the section 1981, 1982, 1985 and 1986 claims had to be dismissed for failure to state a claim because plaintiff did

not allege that defendants acted out of a racial or class based bias (54-55). The Court also adopted several of defendant's arguments on the section 1983 claims. The Court stated that the claims based on events that occurred prior to January 9, 1983 are time barred (56). The conspiracy claims were dismissed as "vague and conclusory" (55). The Court stated (55-56):

[Plaintiff] fails to state, with any degree of particularity, the purpose of or any overt acts perpetrated by defendants which reasonably relate to the claimed conspiracies. Plaintiff's naked assertions regarding various conspiracies do not suffice to state a claim under Section 1983.

The Court dismissed the defamation claims on the authority of Paul v. Davis (56).

The Court found, however, that plaintiff had stated a valid section

1983 claim for his "liberty interest in freedom from bodily injury" (56-57).

The Court then discussed why it was appropriate, under Colorado River, to stay the section 1983 claim pending the outcome of the related state court proceedings.

The Court stated that the state and federal law suits constituted "parallel litigation" because they arose out of the same events, and both raised "predominantly state law tort claims and [add] almost as a postscript, that defendants' actions violated his civil rights" (58). The Court did not think that plaintiff's failure to name the individual defendants in the state action was significant because the complaint could be amended (58-59).

Listing the Colorado River considerations for staying a federal

action in the interest of judicial economy, the Court decided a stay was appropriate. The state proceedings had begun two years earlier and discovery had begun (59).<sup>4</sup> Some of the claims that are time barred in the federal suit are valid in state court (60). The Court stated that proceeding with both actions would be duplicative (59): "The state and federal actions are nearly identical, requiring the same witnesses to be called in both proceedings."

Finally, the Court noted that both complaints raise "predominantly state law issues" (59). Therefore, "the source of law factor weighs in favor of a stay" (60). Moreover the Court found that the state action could adequately protect all of plaintiff's rights, including his federal civil rights

(60). Therefore, the Court granted the stay in the interests of judicial economy.

#### ARGUMENT

1. THE DISMISSAL OF PLAINTIFF'S CLAIMS UNDER 42 USC §§1981, 1982, 1985 AND 1986 WAS PROPER. PLAINTIFF'S CONSPIRACY AND DEFAMATION CLAIMS UNDER SECTION 1983 WERE ALSO PROPERLY DISMISSED.

Plaintiff does not allege that any of the defendants deprived him of his rights because of a racial or class based bias. Therefore, he has failed to state a claim under sections 1981, 1982, 1985 and 1986. See, e.g., Runyon v. McCrary, 427 U.S. 160, 170 (1976) (section 1981); City of Memphis v. Greene, 451 U.S. 100, 120 (1981) (section 1982); United Brotherhood of Carpenters & Joiners of America v. Scott, 463 U.S. 825, 829 (1982) (section 1985); Kush v. Rutledge, 460

U.S. 719, 722-23 (1983) (section 1985)  
Thompson v. State of New York, 487 F.  
Supp. 212, 229 (N.D.N.Y. 1979) (section  
1986).

Accepting for the purposes of this  
appeal only, that the District Court  
was correct in finding that some of  
plaintiff's claims under section 1983  
were viable, the Court properly  
dismissed plaintiff's other section  
1983 claims. The allegations  
concerning events that occurred more  
than three years before plaintiff began  
this action are time barred. Wilson v.  
Garcia, 471 U.S. 261, 276 (1985);  
Villante v. Department of Corrections,  
786 F.2d 516, 520 n.2 (2d Cir. 1986).

Plaintiff's allegation of a  
conspiracy fails to state a claim  
because the allegations are not  
specific:

[I]n the Second Circuit, complaints based on the conspiracy provisions of the Civil Rights Act cannot rest on vague and conclusory allegations but must allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy.

Mopurgo v. Board of Higher Education, 423 F. Supp. 704, 713 (S.D.N.Y. 1976), quoting, Powell v. Workmen's Compensation Board, 327 F 2d 131, 137 (2d Cir. 1964). Plaintiff did not allege the purpose of the conspiracy, what acts furthered the purpose of the conspiracy, how the acts furthered the purpose, and who participated in the conspiracy. Therefore, the Court below properly dismissed the conspiracy claim.

Plaintiff's argument on appeal that "[t]o apprehend the extent of the conspiracy, we need only consider the relationships among the conspirators" and his list of conspirators (App. Br.

at 20), does not sufficiently illuminate the nature of his conspiracy claim.

Plaintiff's defamation allegations do not state a claim under section 1983. Defamation is remediable under state tort law, but it does not deprive an individual of liberty or property and, therefore does not violate the individual's due process rights under the Fourteenth Amendment. Paul v. Davis, 424 U.S. 693, 710-12 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). Moreover, to the extent plaintiff's claim is related to his being brought up on charges for neglect of duty, state law provides an elaborate hearing process to safeguard his due process rights. See N.Y. Education Law §3020-a (McKinney).



II. PLAINTIFF'S REMAINING SECTION  
1983 CLAIMS WERE PROPERLY  
STAYED UNDER COLORADO RIVER  
BECAUSE "EXCEPTIONAL  
CIRCUMSTANCES" APPLY.

This case presents exceptional circumstances making a stay appropriate based on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Colorado River Water Conservation District v. United States, 424 U.S. 800, 817 (1976) (quotations and citations omitted).<sup>5</sup> As this Court explained in Bethlehem Contracting Co. v. Lehrer/McGovern, Inc., 800 F.2d 325 (2d Cir. 1986), several factors developed in Colorado River and in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983), must be considered in deciding whether a stay should issue

under the exceptional circumstances  
test. Those factors are:

the assumption by either court of jurisdiction over any res or property, the inconvenience of the federal forum, the avoidance of piecemeal litigation, the order in which jurisdiction was obtained[,] ... whether state or federal law supplies the rule of decision, and whether the state court will adequately protect the rights of the party seeking to invoke federal jurisdiction.

Bethlehem Contracting Co., supra, 800 F  
2d at 327.

The District Court's decision that these factors weigh in favor of a stay was not an abuse of discretion. First, as the District Court found, the state action arises out of the same factual allegations as the federal action (58). Thus, parallel litigation of the two suits will result in piecemeal litigation.

Second, the state action was begun in 1984, two years before the federal action. A complaint and answer have been filed and defendant has noticed its discovery demands.<sup>6</sup> Thus, this case is unlike Bethlehem Contracting Co. where this Circuit found the District Court had abused its discretion in issuing a stay because, in part, the state proceedings had not consisted of more than the filing of a complaint.

Third, plaintiff's complaint raises primarily state law tort claims regarding assaults on him by students and the failure of school authorities to prevent the assaults or punish his assailants. His section 1983 claims, which the District Court described as "almost ... a postscript" to his state action (58), may properly be heard in

state court along with his predominantly state law claims. There can be no disputing the fact that the Courts of New York State will hear plaintiff's civil rights claim. See, e.g., South Salina Street v. City of Syracuse, \_\_NY2d\_\_, New York Law Journal, Nov. 26, 1986, p. 17, col. 1.

Finally, and of perhaps the greatest importance, all of plaintiff's claims can only be heard in state court because some of his claims are time barred in federal court. Therefore, not only will the state court "adequately protect the rights of the party seeking to invoke federal jurisdiction," Bethlehem Contracting Co., supra, 800 F 2d at 827, but some of plaintiff's claims of violation of right cannot be heard in federal court. Thus, the District Court

properly exercised its discretion in staying plaintiff's 1983 claims pending the outcome of the state proceedings.<sup>7</sup>

#### CONCLUSION

THE ORDER APPEALED FROM SHOULD BE AFFIRMED WITH COSTS.

January 29, 1987

Respectfully submitted,

DORON GOPSTEIN  
Acting Corporation Counsel,  
Attorney for Defendants-  
Appellees.

ELIZABETH DVORKIN  
JUNE A. WITTERSCHEIN  
of Counsel.

<sup>1</sup>Unless otherwise indicated, parenthetical references are to Plaintiff's Appendix.

<sup>2</sup>Plaintiff filed three different complaints (53). The complaints are substantially similar and were consolidated by the District Court on its own motion (54). All references to plaintiff's complaint will be to the amended complaint in civil action 86-99, unless otherwise indicated.

After Judge Bramwell dismissed the three complaints, plaintiff filed a fourth complaint, which he described as adding additional causes of action (61). This complaint is quite similar to the previous three complaints. It is this fourth complaint that is included in plaintiff's appendix.

Because the fourth complaint does not differ in any relevant aspect from the complaint in civil action 86-99, page citations will be to the complaint included in plaintiff's appendix.

<sup>3</sup>Plaintiff's brief does not discuss this aspect of the Court's decision. He apparently has limited his appeal to the claims against the municipal defendants.

<sup>4</sup>Defendants had noticed their demand for discovery, inspection and copying (22-23). However, plaintiff never responded to the demand.

<sup>5</sup>The District Court's stay order is appealable as a final order under Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 10 (1983).

<sup>6</sup>Plaintiff alleges on appeal that he also noticed a discovery demand and defendants did not respond. (App. Br. at 10). This claim demonstrates that both parties have invoked the state discovery processes. We note that defendants have no record of receiving a discovery demand from plaintiff. Obviously, discovery disputes in the

state court action should be resolved in state court.

7Plaintiff makes new arguments on appeal regarding alleged actions by the defendants which he did not include in any papers before the District Court (App. Br. at 4-6). Because they were not considered by the District Court, Defendants will not address these new allegations.

## ARTICLE TEN

### SAFETY

#### A. Assistance in Assault Cases

1. The principal shall report as soon as possible but within 24 hours to the Office of Legal Services and to the Director of School Safety that an assault upon a teacher has been reported to him. The principal shall investigate and file a complete report as soon as possible to the Office of Legal Services and to the Director of School Safety. The full report shall be signed by the teacher to acknowledge that he has seen the report and he may append a statement to such report.

2. The Office of Legal Services shall inform the teacher immediately of his rights under the law and shall



provide such information in a written document.

3. The Office of Legal Services shall notify the teacher of its readiness to assist the teacher.

This assistance is intended solely to apply to the criminal aspect of any case arising from such assault.

---

4. Should the Office of Legal Services fail to provide an attorney to appear with the teacher in Family Court, the Board will reimburse the teacher if he retains his own attorney for only one such appearance in an amount up to \$40.00.

5. An assaulted employee who presses charges against his assailant shall have his days of court appearance

designated as non-attendance days with pay.

6. The provisions of the 1982-83 Chancellor's Memorandum entitled "Assistance to Staff in Matters Concerning Assaults" shall apply.

## CITY SCHOOLS

By Sandra Feldman, President  
United Federation of Teachers

### WHAT GETS IN THE WAY OF MY TEACHING

'You see, to some, the school's image is more important than individual rights. . . . Too often, the rights of the perpetrator appear more important than the rights of the victim'

Note: On May 8, A group of teachers testified along with me at a special hearing on "Obstacles to Teaching" conducted by City Council President Andrew Stein. Their testimony was frank and heart-tugging, covering the

gamut from supply shortages to crime in the schools. The hearing received wide press coverage.

I asked one of the teachers, James Baumann, a teacher and dean at Queens' Franklin K. Lane High School to excerpt his testimony for this column.

Sandy

By James Baumann

Nearly 20 years on the school system have repeatedly taught me that there is a subtle and pervasive pressure on school staff not to report disciplinary infractions or untoward incidents, not to seek police help and not to pursue student suspensions.

Victims of such pressure may include, superintendents and more frequently, principals. But most often the victim is the teacher,

paraprofessional, counselor or other  
school staff members.

Classroom teachers who report  
disciplinary infractions will find  
their classroom management -- indeed,  
their professionalism -- viewed with  
suspicion by their supervisors.  
Supervisors frequently classify such  
teachers as "weak" and make them  
targets.

Why? Because if a school honestly  
and accurately reports incidents,  
suspensions, and arrests, the  
principal's administrative ability  
becomes suspect. Even victims of  
school violence may meet resistance  
from administrators if they insist on  
pressing criminal charges. You see, to  
some, the school's image is more  
important than individual rights. In  
cases that do go to hearings, there can

be more insult to staff professionalism. These proceedings often require involved parties to make two, three or more trips to the hearing office. Witnesses and school staff may be kept waiting for hours and are often treated curtly by hearing office personnel. Cross examination frequently questions the judgment of school staff. Too often the rights of the alleged perpetrator appear more important than the rights of the victim.

Recently police arrested two students in front of my school for weapons possession (a loaded .357 and an imitation pistol). The local superintendent suspended the students. After three months of delay, the hearing officer dismissed both cases on procedural grounds stating "lack of jurisdiction."

Yet last year, one "student" robbed another of a gold chain at an elevated train station a mile or two from the school. The victim spotted his robber in the school cafeteria, police arrested him and the superintendent suspended him. In that case, the hearing officer sustained the suspension.

Ever wonder if the left hand knows what the right hand is doing in this school system?

We all learn in school -- and from what I can see, some of the things that kids and teachers learn are not too positive. For example, teachers learn not to use the disciplinary procedures and kids learn that the emperor has no clothes -- that there are no consequences.

So when the Gallup Poll Indicates that the overwhelming number of parents

are dissatisfied with school discipline, there is a very good reason for it. We could be well on our way to a total no-win scenario in which everyone is a loser: the kid who acts out loses because the first real restraint he may encounter could be a nightstick. The good kids lose because time taken up with discipline comes out of instructional time. Teachers lose because they are prevented from doing their jobs. And not least of all, the system loses because some of our best teachers have left -- and are leaving.

(Teachers, by the way, are not the only ones who leave. Parents who have other options, such as moving away or sending their kids to private schools, will take those, rather than send their kids to an unsafe school or a school where they feel the discipline is poor.)



That leaves the question: Just what should we be concentrating on in this situation?

Well, instead of fewer suspensions, how about striving toward fewer assaults, fewer robberies, fewer larcenies? Instead of sitting on discipline cases, how about expanding the pitifully few programs and supportive services for kids who are having problems in regular school settings? How about some values-oriented education where kids can learn the difference between right and wrong?

For, in the final analysis, if we really care about our kids, we simply can't continue letting them do whatever they want.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff

Judge Bramwell  
Civil Action  
vs Docket No. CV-86-0099

THE CITY OF NEW YORK, THE BOARD OF  
EDUCATION OF THE CITY OF NEW YORK,  
VICTOR VILAREAL, ALAN I. IRGANG,  
JOHN SISTI, ROBERT J. LEVENTHAL,  
PETER ROSENBERG, XAVIER FRANCIS  
RUGGIERO, LOFTUS NOVELTY AND MAGIC  
COMPANY, A CORPORATION, DOE ONE,  
DOE TWO

Defendants.

-----x  
MOTION FOR  
TEMPORARY  
RESTRAINING  
ORDER

1. Plaintiff, Harry N. Zemsky, moves  
the court for a temporary restraining  
order, without prior notice to the  
defendants, The City of New York, the  
Board of Education of the City of New  
York, Victor Vilareal, Alan I. Irgang,  
John Sisti, Robert J. Leventhal, Peter

Rosenberg, Xavier Francis Ruggiero, Doe One, Doe Two, et al in accordance with Rule 65(b) of the Federal Rules of Civil Procedure, to be served with the Summons, Complaint and Amended Complaint on the defendants in the Civil Action described in the caption above.

2. This application is necessitated because, as alleged in the complaint and amended complaint in this action, the defendants conspired and acted intentionally and maliciously to impede, obstruct and deny justice when the plaintiff sought to lawfully enforce his rights to due process of law and equal protection of the laws, when these defendants knowingly and maliciously prepared and disseminated false and inaccurate testimony and other evidence; and suppressed,

withheld and destroyed documents and other material evidence relating to litigation involving the plaintiff and his employer, after the plaintiff began legal process in April 1983 for wrongful injury and loss.

3. Therefore, the plaintiff has substantial reason to fear that service of the summons and other papers on the defendants in this action, will precipitate similar misconduct by the defendants, and will result in immediate and irreparable injury, loss and damage to the plaintiffs efforts to obtain justice in this court.

4. It is therefore requested that the court grant, ex parte, a temporary restraining order, until a permanent injunction can be obtained in accordance with Rule 65(a)(1) of the Federal Rules of Civil Procedure,

ordering the defendants, their agents, employees, servants and attorneys to refrain from adding to, or removing, concealing, destroying, mutilating, altering or by any other means falsifying any documentary materials, or other evidence; or soliciting another person to do so;' that is related in any way to any matter complained of by the plaintiff in his complaint; without prior notification to, and written approval by the plaintiff or the court in this action.

/s/

HARRY N. ZEMSKY, Pro Se  
3030 Emmons Avenue  
Brooklyn, New York 11235  
(718) 934-7358

THE BOARD OF EDUCATION  
OF THE CITY SCHOOL DISTRICT OF NEW YORK  
DIVISION OF PERSONNEL  
65 COURT STREET  
BROOKLYN, N.Y. 11201

2/4/86

RE: Sabbatical Leave

Dear Harry N. Zemsky

Your request for sabbatical leave for restoration of health has been received by the Medical Bureau. Your physician's statement and all relevant supporting documentation have been reviewed.

The finding of the Medical Bureau is that this sabbatical is not recommended because:

- X (1) Due to the chronic nature of your condition, there is little likelihood of health improvement to be achieved by granting this leave.

\_\_\_\_ (2) There are insufficient medical grounds to require your absence from duty for this period of time.

Sincerely yours,

/S/

Audrey Jacobson,  
M.D., M.P.H.  
Medical Director

AJ:mg

cc: Community/High School Superintendent  
Principal  
Teacher Status and Records  
Medical Bureau

Office of the Superintendant of  
Brooklyn High Schools  
1600 Avenue L  
Brooklyn, New York 11230  
(718) 258-4826

March 20, 1986

Mr. Harry Zemsky  
3030 Emmons Avenue  
Brooklyn, NY 11235

Dear Mr. Zemsky:

A hearing was held on Tuesday,  
March 18, 1986 regarding the performance  
of your duties at Franklin Delano  
Roosevelt High School. Mr. Max  
Brimberg, U.F.T. District  
Representative, Mr. Michael Grossman,  
U.F.T. Chapter Chairman, Mr. Alan  
Irgang, Principal and Mr. Martin

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Goldberg, my Executive assistant, were also present.

At the hearing, we discussed a number of matters in regard to your record and performance at the school. I expressed my deep concern over your attendance record at F.D.R. You have been absent for 29 days during this current school year. You were absent at 17 different periods for a total of 33 school days during the 1984-1985 school year and you were absent at 19 different periods for a total of 27 days for the 1983-1984 school year. My paramount interest is in promoting better education for our students and your record of intensive absence jeopardizes the learning possibilities of your students.

During the course of our meeting, I also questioned your refusal to

acknowledge the receipt of letters and reports from your supervisors and your failure to respond to their letters and reports. I cited as examples the observation reports which has been sent to you for classroom observations which occurred on November 22, 1985, December 16, 1985 and February 24, 1986. you admitted to receiving copies of these three reports with the request that you sign and return a copy of each to acknowledge your receipt of said reports. You stated that you had elected not to respond to the requests. Your comment that no one "ordered you to sign and return each report" is begging the question. Tradition and practice, added to the by-laws and various memorandums and circulars of the New York City Board of Education, have made it a mandatory

procedure for many years that a teacher must, upon the request of the Principal or Principal's designee (i.e. the Assistant Principal), acknowledge the receipt of a report or letter from his supervisor. Your action in refusing to acknowledge or to respond to these reports constitutes nothing less than acts of insubordination on your part.

I must add that your comments at the hearing raised serious concerns regarding your attitudes towards teaching and towards the school. You stated that you had not yet even opened the observation report which was given to you some time ago for the lesson on February 24.

The reasons you offered for your extensive absence record do not mitigate the unsatisfactory nature of your record. In addition, your acts of

insubordination in the matter of  
acknowledging and responding to letters  
and reports from your supervisors  
indicate a callous disregard for all of  
the assistance being offered to you.  
Your behavior and attitude is  
unacceptable and unsatisfactory and  
lead me to recommend your removal from  
service to the Chancellor.

Please be advised that I am  
ordering you to report to the Medical  
Division under the provisions of  
Section 2568 of the Education Law to  
determine your fitness to continue  
teaching.

Very truly yours,

/s/

Martin Ilivicky  
Superintendent  
Brooklyn High  
Schools

MI:bb

cc: Alan Irgang  
Max Brimberg  
Michael Grossman

I have received a copy of this letter  
and know it is being placed in my file

/s/ Harry N. Zemsky

Received at 1:00 P.M. March 21, 1986

Acknowledgment of Receipt by  
undersigned is made under protest and  
threat of further charges of  
insubordination.

THE BOARD OF EDUCATION  
OF THE CITY SCHOOL DISTRICT OF  
NEW YORK  
DIVISION OF PERSONNEL  
65 COURT STREET  
BROOKLYN, N.Y. 11201

TO: DISTRICT/SUPERVISOR

FROM: Julian R. Covell  
Administrator  
Medical Bureau

RE: Name Zemsky, Harry  
File # 341103  
S.S. # 112-20-5354  
School/Site Franklin D.  
Roosevelt H.S.

-----

The above named employee was examined  
on 4/9/86 .

The result of this examination and a  
review of all related documentation is:

Fit X

Not Fit

Judgment suspended pending receipt of  
additional information\_\_\_\_\_

Other\_\_\_\_\_

Comments 2568 letter will follow

APPROVED: s/s

DATE: 4/9/86

cc: Principal

Employee

Medical Bureau

OF THE CITY SCHOOL DISTRICT OF NEW YORK  
DIVISION OF PERSONNEL  
65 COURT STREET  
BROOKLYN, N.Y. 11201

CERTIFIED MAIL-RETURN RECEIPT REQUESTED  
( P 793 922 974 )

Date 3/25/86

Mr. Harry Zemsky  
3030 Emmons Ave.  
Brooklyn, NY 11235

Dear Sir/Madam:

Pursuant to Section 2568 of the  
State Education Law, you are directed  
to appear in the Medical Bureau, Room  
201, on Wednesday, April 9, 1986  
at 10:00 A.M. for an examination.

This directive is made at the  
request of Martin Ilivicky  
Superintendent, Bklyn H.S. . You may  
be accompanied at this examination by  
one person of your choice.



Very truly yours,

S/S

Julian R. Covell  
Administrator

JRC:jh

---

Mr. Martin Ilivicky, Superintendent,  
Bklyn, HS  
cc: Mr. Alan Irgang, Principal,  
Franklin D. Roosevelt HS  
Medical Bureau  
Regular mail

---

BOARD OF EDUCATION OF THE CITY  
OF NEW YORK  
110 LIVINGSTON STREET  
BROOKLYN, NEW YORK 11201

OFFICE OF THE SECRETARY

JOHN R. NOLAN  
Secretary

BEATRICE STEINBERG  
Assistant Secretary

June 25, 1986

Mr. Harry Zemsky  
3030 Emmons Avenue  
Brooklyn, NY 11235

Dear Mr. Zemsky:

This is to advise you that the finding of probable cause for charges against you by the Chancellor on June 20, 1986 will appear on the Calendar of the Board of Education at its meeting to be held on July 1, 1986 at 11:00 A.M. at the Hall of the Board, 110 Livingston Street, Brooklyn, New York.

The matter will appear as Item No. 26  
on the Calendar for consideration by  
the Board of Education. A copy of the  
resolution is enclosed.

Very truly yours,

/s/

John R. Nolan  
Secretary  
Board of Education

JRN:BS:bdc  
Enc.

CERTIFIED MAIL - RETURN REQUESTED and  
REGULAR MAIL

BOARD OF EDUCATION  
OF THE CITY OF NEW YORK  
110 Livingston Street  
Brooklyn, NY 11201

NATHAN QUINONES  
CHANCELLOR

CERTIFIED MAIL -- RETURN RECEIPT  
REQUESTED

June 25, 1986

Mr. Harry Zemsky  
3030 Emmons Avenue  
Brooklyn, New York 11235

Dear Mr. Zemsky:

I have been advised by the Board of Education that probable cause has been found for the charges preferred against you. In addition, recommendations have been made, by the Division of High Schools and the Division of Personnel, that you be suspended.

I have determined that the nature of the charges against you requires your immediate removal from your assigned duties. Therefore, in

accordance with Education Law §3020-a,  
I hereby suspend you with pay effective  
as of the close of business September  
3, 1986, pending the hearing and  
determination of the charges preferred  
against you.

You are directed to report to Mr.  
Martin Ilivicky, Superintendent of  
Brooklyn High Schools, Edward R. Murrow  
High School, 1600 Avenue L, Brooklyn,  
New York on September 3, 1986 for  
reassignment.

Very truly yours,

/s/

NATHAN QUINONES  
Chancellor

NQ/dt

cc: Kenneth G. Standard, Esq.  
Edward Aquilone  
Sylvia Ballatt  
Martin Ilivicky  
James Stein  
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BOARD OF EDUCATION OF THE  
CITY OF NEW YORK  
110 LIVINGSTON STREET,  
BROOKLYN, NEW YORK 11201

July 1, 1986

Bd. Ed. Mtg. 7/1/86  
Cal. No. 26

Mr. Harry Zemsky  
3030 Emmons Avenue  
Brooklyn, NY 11235

Dear Mr. Zemsky:

Enclosed for your information is a  
certified copy of the resolution  
adopted by the Board of Education on  
July 1, 1986 with reference to the  
charges preferred against you by the  
Chancellor.

Very truly yours,

/S/

John R. Nolan  
Secretary  
Board of Education

JRN:BS:bdc

Enc.

cc: Mrs. Tucker (Att: Ms. Weinstein)  
Mr. Standard  
Files

CERTIFIED MAIL - RETURN RECEIPT  
REQUESTED and REGULAR MAIL

Bd. Ed. Mtg. 7/1/86  
Cal. No. 26

FINDING OF PROBABLE CAUSE FOR CHARGES  
AGAINST A TENURED TEACHER OF SOCIAL  
STUDIES FILE #341103

The following resolution is presented  
for adoption:

WHEREAS, on June 20, 1986, the  
Chancellor submitted charges to the  
Board of Education against respondent,  
a tenured teacher of social studies;  
and

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WHEREAS, the Board of Education reviewed these charges and in executive session on June 25, 1986 determined that there is probable cause for said charges and ordered an administrative trial in accordance with State Education Law section 3020-a; now therefore be it

RESOLVED, that the Board of Education herewith ratifies its decision made in executive session on June 25, 1986.

Respectfully submitted

June 25, 1986     /S/ James F. Regan



A true copy of resolution(s) adopted by  
the Board of Education on July 1, 1986

/S/

Assistant Secretary, Board of Education

Harry Zemsky

New York State United Teachers  
Office of the General Counsel

July 10, 1986

Mr. Harry Zemsky

3030 Emmons Avenue

Brooklyn, New York 11235

RE: Zemsky, Harry advs. BOE, CSD, CNY

Our File No. 53807-T101

Dear Mr. Zemsky:

This office is in receipt of a request from your UFT representative, for your legal representation in the tenure charges pending against you.

The case has been opened and the undersigned has been assigned to represent you. As soon as you have received this letter, please call me at (212) 533-6300 between 10:00 a.m. and 6:00 p.m. any weekday, in order that we

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may arrange for a mutually convenient meeting.

If you have not already done so, you will shortly receive from the State Education Department, a notice entitled "List of Participants." This notice will include tentative scheduled hearing dates which will be adhered to unless both sides agree otherwise.

While you are waiting to meet with me, you should prepare a written response to each item in the charges and obtain a copy of your entire personnel file. Your representative can assist you with these tasks. These items will be necessary for our first meeting and you can save time and aid in the initial preparation of your case by doing these things as soon as possible.

This office will advise the State Education Department that it is representing you and we will then receive copies of all materials sent from the State Education Department related to your case.

If you wish to have a private attorney represent you, you should notify this office immediately so that we do not advise the State Education Department that we will be representing you. The Union, you should know, will not pay the cost of your private attorney and this office will not act as co-counsel to your private attorney.

Your cooperation in preparing the written response and securing a copy of your personnel file will be appreciated and very helpful.

As soon as you have contacted me and we set up an appointment, any

questions and concerns that you have with respect to the preparation of your case including the pursuit of settlement possibilities, can be handled.

I look forward to hearing from you.

Very truly yours,

JAMES R. SANDNER

By: /s/  
JACOB S. FELDMAN  
Associate Counsel

JSF/mlm

cc: Catherine Davenport  
UFT Representative

BOARD OF EDUCATION  
OF THE CITY OF NEW YORK  
110 LIVINGSTON STREET  
BROOKLYN, N.Y. 11201

FORM 3020-a-5

NOTICE OF THE NEED FOR A HEARING ON  
CHARGES AGAINST A TENURED SCHOOL  
DISTRICT EMPLOYEE  
Section 3020-a  
Education Law

To the Commissioner of Education:

Please be advised that the Board of Education of the City School District of New York, 110 Livingston Street, having found that there is probable cause for the charges filed against Harry Zemsky, a tenured employee of this school district, in an executive session of the board of education held on June 25, 1986, and the employee having requested a hearing on said

charges that there is a need for a hearing of said charges. Space for the hearing will be provided at 110 Livingston Street, Room 925. Attached is the proof of service of a copy of the charges on the named employee.

The complainant has appointed:

Kenneth G. Standard  
110 Livingston Street  
Brooklyn, New York 11201  
(718) 596-4197

to serve as his/her attorney as provided by Section 3020-a of the Education Law.

July 25, 1986

\_\_\_\_\_  
(date)

/s/

\_\_\_\_\_  
John R. Nolan  
Secretary, Board of  
Education

Attachments

Note: A copy of this notice must be forwarded immediately to the above named tenured school district employee by certified mail.

THE CITY OF NEW YORK  
TEACHER'S RETIREMENT SYSTEM  
40 Worth Street  
New York, N.Y. 10013  
(212) 566-6676

00T611562

September 2, 1986

TO WHOM IT MAY CONCERN:

This is to certify that Harry  
Zemsky 00T611562 filed a service  
retirement application, effective Sept.  
3, 1986.

/s/  
Wallace F. Sullivan  
Executive Director



NEW YORK CITY  
BOARD OF EDUCATION  
110 Livingston Street  
Brooklyn, New York 11201

Nathan Quinones  
Chancellor

Division of Special Education  
Edward M. Sermier  
Chief Administrator  
(718) 596-8928

October 27, 1986

Dear Colleague:

The Division of Personnel has identified you as a teacher with a current, valid license or certificate who is not presently a full-time employee of the New York City Board of Education. We would like to inform you of an opportunity within the Division of Special Education, which has received a special grant to provide 5 days of training for each special

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education classroom teacher. This means the Division of Special Education will be able to offer you approximately 60 days employment as a substitute teacher, in the period from November, 1986 through May, 1987, for which you will receive substitutes' pay of \$74.20 per day.

Every effort will be made to assign you to continuous service in a school convenient to you. In addition, if your substitute service is satisfactory, you will be given preference for full-time employment should a vacancy occur.

First preference will be given to those who are able to commit themselves to working for the greatest amount of time. However, if you are only able to commit

yourself to two or three months work,  
we would still like to hear from you  
and will probably be able to offer you  
a substantial amount of work.

An application form is attached for  
your convenience. If you are  
interested in this offer, please  
complete the form and return it  
immediately, as indicated. We hope you  
will be able to take advantage of this  
opportunity, and look forward to  
hearing from you.

Please return the enclosed form to:

Division of Special Education  
Personnel Office - Room 327  
110 Livingston Street  
Brooklyn, New York 11201

Sincerely,

/s/

Edward M. Sermier

Enclosure  
9825P4

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff

v.

ORDER  
86 CV 1437 (HB)

THE BOARD OF EDUCATION OF  
THE CITY OF NEW YORK

Defendants.

-----x

A status conference will be held in this case on November 14, 1986 at 11:10 A.M. before A. Simon Chrein, United States Magistrate, in Room 352, 225 Cadman Plaza East, Brooklyn, New York. All counsel must be present. In the event an answer has not yet been filed, plaintiff's counsel is to notify counsel for the defendant of this conference as soon as an answer is filed. If an answer is not filed plaintiff's counsel is to notify the

undersigned, in writing, to reach me two days before the scheduled conference. No request for adjournment will be considered unless made at least forty-eight (48) hours before the scheduled conference.

The Clerk is directed to mail a copy of this Order to counsel for all parties appearing in this case.

SO ORDERED.

Dated: Brooklyn, New York

Sept. 3, 1986

/s/\_\_\_\_\_

A. SIMON CHREIN

United States Magistrate

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff

v.

ORDER  
86 CV 936 (HB)

THE BOARD OF EDUCATION OF  
THE CITY OF NEW YORK

Defendants.

-----x

A status conference will be held in the case on November 14, 1986 at 11:10 A.M. before A. Simon Chrein, United States Magistrate, in Room 352, 225 Cadman Plaza East, Brooklyn, New York. All counsel must be present. In the event an answer has not yet been filed, plaintiff's counsel is to notify counsel for the defendant of this conference as soon as an answer is filed. If an answer is not filed plaintiff's counsel is to notify the

undersigned, in writing, to reach me two days before the scheduled conference. No request for adjournment will be considered unless made at least forty-eight (48) hours before the scheduled conference.

The Clerk is directed to mail a copy of this Order to counsel for all parties appearing in this case.

SO ORDERED.

Dated: Brooklyn, New York

Sept. 3, 1986

/S/

A. SIMON CHREIN

United States Magistrate

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff

-against-

86-CV-2145

THE CITY OF NEW YORK, et al.,

Defendants.

-----x

BRAMWELL, D.J.

After reviewing the file in this matter, the Court hereby directs the attorneys for the parties to the above-captioned matter appear for a pre-trial conference on Friday, January 23, 1986, at 2:45 PM, in Room 628, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York.



If either attorney finds it impossible to attend said conference, he is to contact my law clerks. Your cooperation in this matter is requested.

/s/Henry Bramwell  
U.S.D.J.

Dated: Brooklyn, New York  
December 8, 1986

Report on incident Dated Jan. 10, 1983

Teacher: Mr. Zemsky

Student: Victor Vilareal

Time: 1:55 pm

Student stated that he and his friend Anthony Pelligrino were fooling around in the hallway on the 4th floor. Victor while attempting to squirt, Anthony, squirted Mr. Zemsky on his shirt.

Mr. Zemsky had Victor brought to the Deans' Office by Security Officer Schoeller. Mr. Zemsky then came to the office stating that Victor entered his subject classroom (461) and squirted a blue liquid in his face.

Mr. Ruggiero, called Mrs. Vilareal to school for a Deans conference on Jan. 12, 1983. On that date a Deans' conference was held with Mr. Rosenberg, Mr. Ruggiero and parent. The seriousness of the matter was impressed on the parent. Mrs. Vilareal appologized for the actions of her son and promised continued cooperation.

Peter Rosenberg  
Dean

My friend Anthony Pelligrino and I were playing with dissappearing ink. I was struggling with Anthony to squirt it on him (Anthony), when we accidentally squirted it on Mr. Zemskys lower stomach area. After 3 minutes the dissappearing ink dissappeared off of his shirt.,

/s/ Victor Vilareal

FRANKLIN DELANO ROOSEVELT HIGH SCHOOL

March 29, 1985

To Whom It May Concern:

My observations as Principal of Franklin D. Roosevelt H.S. clearly indicate that Mr. Harry Zemsky has made a practice of filing accident reports for alleged incidents that truly do not require said accident reports.

During the past year and a half, he has filed a total of five accident reports. Additionally, his description of the reports, in most cases, has been found to be overly exaggerated.

Please do not hesitate to call me  
if you have any additional questions.

Yours truly,

Alan Irgang  
Principal

mlc

ACCIDENT REPORTS FOR MR. ZEMSKY

12/13/83     Mr. Zemsky was struck on  
noon           head by an object thrown by  
                 a student. Mr. Zemsky  
                 claims the object was hard  
                 metal, rock or ceramic.  
                 Upon Dean's investigation,  
                 it was learned that student  
                 threw paper into the room  
                 which hit Mr. Zemsky.

\*     (Students interviewed by  
         Deans admitted throwing  
         paper.)

12/13/83     Student dripped liquid,  
9:25 a.m.     presumably water, on Mr.  
                 Zemsky's head. Mr. Zemsky  
                 does not believe this  
                 incident caused any injury.

\* (Student interviewed  
admitted bringing a wet  
umbrella into class.)

1/10/83 A student squirted a blue  
liquid into Mr. Zemsky's  
eyes and face. Student  
claims the substance was  
"disappearing ink". On  
January 12, 1983 a  
conference was held with the  
deans, student, Victor  
Vilareal, and parent. The  
same student, Victor  
Vilareal, was involved in a  
similar incident on June 7,  
1982 when he squirted fluid  
from a simulated cigarette  
lighter into Mr. Zemsky's  
eyes and face.



\* (Parent conference held.

Mr. Ruggiero informed only  
of fluid on shirt.)

Mr. Zemsky filed a ONE  
MILLION DOLLAR claim against  
the city for the Jan. 10,  
1983 accident.

6/7/82      Student squirted a stream of  
fluid at Mr. Zemsky from a  
simulated cigarette lighter  
hitting him in his eyes and  
face.

\* (Warning letter sent after  
student interviewed).

6/12/75      Mr. Zemsky was hit in his  
face by a stream of water  
from a water gun. He also  
injured his right hand and  
ring finger of right hand.

1

\*\* (-----)

3/18/72    Mr. Zemsky reported that  
             someone sprayed an  
             irritating substance into  
             his room, possibly mace,  
             resulting in irritation of  
             his eyes, forehead, nose and  
             throat. Mr. Zemsky claims  
             that later that day and  
             night he experience a fluid  
             discharge from his nose and  
             throat which was spotted  
             with blood.

\*\*\* (-----)

---

\*    Hand-written interpolations by a  
     municipal defendant on original.

\*\*    "Student suspended" written in,  
     then crossed out, by Municipal  
     Defendant.

\*\*\*    Illegible interpolation written in;  
     then crossed out by municipal  
     defendant.

APP.- 205 -

THE CITY OF NEW YORK  
OFFICE OF THE COMPTROLLER  
BUREAU OF LAW AND ADJUSTMENT  
Division of Settlements

Mr. Michael O'Dwyer  
New York City Board of Education  
65 Court Street, Room 405  
Brooklyn, New York 11201

REQUEST FOR DEPARTMENTAL REPORT

Claimant's Name: Harry Zemsky  
Claim Number: T404477  
Date of Request: 4/22/83

Dear Mr. O'Dwyer:

Please send all Departmental Reports  
and/or any information that you have  
regarding allegations made in the  
attached notice of claim.

IMPORTANT: Please return your reply  
promptly, to this Unit  
regarding this "NO  
ATTORNEY" claim.

---

DIVISION OF SETTLEMENTS  
Room 611 - Telephone: 566-2269

ENCLOSURE: Notice of Claim.

BOARD OF EDUCATION  
OF THE CITY OF NEW YORK

DIVISION OF BUSINESS AND ADMINISTRATION  
BUREAU OF UNEMPLOYMENT INSURANCE CLAIMS

In reply, please refer to  
ACCIDENTS & CLAIMS  
596-3927

Date: 4/27/83

To: PRINCIPAL

FROM: Accident Report Unit  
65 Court Street  
Brooklyn, N.Y. 11201

A NOTICE OF CLAIM has been served on  
the Board of Education (copy enclosed)  
arising from property damages or  
personal injuries sustained in your  
school as indicated below:

CLAIMANT: Harry Zemsky

DATE OF ACCIDENT: 1/10/83

LOCATION OF ACCIDENT: Franklin D.

Roosevelt H.S.

NATURE OF CLAIM: Personal injuries

COMPTROLLER'S CASE #: 404477

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Please search your files for a record of the Accident or Incident. If an accident or incident report is on file, kindly send a copy of the report with the enclosed NOTICE OF CLAIM TO:

Office of the Comptroller  
Law & Adjustment, Room 611  
Municipal Building  
New York, N.Y. 10007

ATTENTION: MARK FRANKEL

If for some reason the incident or accident was not reported or the school was not apprised of the incident, please advise the Comptroller's Office of this within 48 hours, using SCHOOL STATIONERY; your letter must include Comptroller's Claim #.

Encl:

MJO:gr

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff, 86-CV-0936

-against- MAGISTRATE  
REFERRAL ORDER

THE CITY OF NEW YORK, THE BOARD OF  
EDUCATION OF THE CITY OF NEW YORK, etc.

Defendants.

-----x  
BRAMWELL, D.J.

The civil case hereinabove set  
forth is referred to Magistrate Chrein,  
for the purpose indicated below:

- x 1. To enter the scheduling order  
provided for in Rule 16(b) of  
the Federal Rules of Civil  
Procedure;
- x 2. To hear and decide any disputes  
arising from discovery or other  
pre-trial activities, except  
for matters exempted by 28  
U.S.C. § 636 (b) (1) (A);

- x 3. To Consider in each instance the possibility, if any, of settlement and to assist therewith as may be appropriate;
- x 4. To prepare a pre-trial order where this has not yet been accomplished, and where such order seems indicated;
5. To schedule an approximate trial date, in consultation with the chambers of the undersigned, as early as feasible;
- x 6. To file a report with the undersigned within 120 days as to the status of the case, in the event the tasks set forth above are not then completed.
- SO ORDERED.

/s/ Henry Bramwell

U.S.D.J.

Dated: Brooklyn, New York

May 12th, 1986



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff, 86-CV-1437

-against-

MAGISTRATE  
REFERRAL ORDER

THE CITY OF NEW YORK, THE BOARD OF  
EDUCATION OF THE CITY OF NEW YORK, etc.

Defendants.

-----x  
BRAMWELL, D.J.

The civil case hereinabove set  
forth is referred to Magistrate Chrein,  
for the purpose indicated below:

- x 1. To enter the scheduling order  
provided for in Rule 16(b) of  
the Federal Rules of Civil  
Procedure;
- x 2. To hear and decide any disputes  
arising from discovery or other  
pre-trial activities, except  
for matters exempted by 28  
U.S.C. § 636 (b) (1) (A);

- x 3. To Consider in each instance the possibility, if any, of settlement and to assist therewith as may be appropriate;
- x 4. To prepare a pre-trial order where this has not yet been accomplished, and where such order seems indicated;
5. To schedule an approximate trial date, in consultation with the chambers of the undersigned, as early as feasible;
- x 6. To file a report with the undersigned within 120 days as to the status of the case, in the event the tasks set forth above are not then completed.
- SO ORDERED.

/s/ Henry Bramwell

U.S.D.J.

Dated: Brooklyn, New York

May 12th, 1986

THE BOARD OF EDUCATION OF THE CITY  
OF NEW YORK  
HUMAN RESOURCES SYSTEM  
FINALIZED PERSONNEL TRANSACTION FORM

TRANS TYPE LWOP-PENDING RETIREMENT  
EFFECTIVE DATE 09/03/86

PTF NUMBER 1778584  
DATE PRINTED 09/10/86

File No. 341103

Soc. Sec. NO. 112-20-5354

H.N. Zemsky

3030 Emmons Avenue Apt. 2W

Brooklyn, New York 11235

TRANSACTION INFORMATION

License Code 6918/Social Studies

Payroll Status 2/Responsible District 78

Pay Dist/Boro/Sch 78-K505

Proposed Effective Date 09/03/86

Leave Type PR

LWOP Pending Retirement

Leave to Date: 01/31/87

Signatures

Date

/s/ Alan Irgang 10/3/86

THE CITY OF NEW YORK  
LAW DEPARTMENT

November 7, 1986

BY HAND

Honorable Henry Bramwell  
United States District Judge  
Eastern District of New York  
225 Cadman Plaza East  
Brooklyn, New York

Re: Zemsky v. Board of Education, et al  
CV - 86 - 2145 (HB)

Dear Judge Bramwell:

I am an Assistant Corporation Counsel in the Office of Frederick A.O. Schwarz, Jr., Corporation Council of the City of New York, attorney for Municipal Defendants in the above-referenced action and in the related and nearly identical actions, bearing the same caption, index numbers CV-86-0099, 0936, and 1437. The summons and complaints in the instant case was served on some of the

APP.- 216 -

Municipal Defendants during October, 1986, nearly four months after your order of June 27, 1986 staying all federal proceedings in the three aforementioned related cases. None of the Municipal Defendants were served prior to your order of June 27, 1986.

We respectfully request a conference with your honor to seek permission to move to dismiss the complaint in the above-referenced action on the grounds, inter alia, that is violative of both your June 27, 1986 order and the provisions of Rule 15 regarding amended complaints or, in the alternative, to consolidate this action with the aforementioned related actions.

Respectfully submitted,

/s/

Alan M. Schlesinger  
Assistant Corporation  
Counsel

Re: Harry Zemsky  
3030 Emmons Avenue  
Brooklyn, N.Y. 11235

3030 Emmons Avenue,  
Brooklyn, New York 11235  
May 26, 1987

Mr. Mounir Bessada,  
Chief Accountant,  
Teachers' Retirement System of the  
City of New York,  
40 Worth Street,  
New York, New York 10013

Dear Mr. Bessada,

Reference is made to your letter  
dated April 27, 1987.

Some of your comments differ with  
information previously given to me by  
the Teachers' Retirement System.

I, therefore, require that the  
Teachers' Retirement System immediately  
send me a certified copy of the complete  
record of my membership in the Teachers  
Retirement System of the City of New  
York. (Membership #00T611562; and  
Pension #069139-0.)



Thank you for your cooperation.

Sincerely yours,  
/s/

HARRY N. ZEMSKY  
3030 Emmons Avenue  
Brooklyn, New York 11235

3030 Emmons Avenue,  
Brooklyn, New York 11235  
June 15, 1987

Mr. Mounir Bessada, Chief Accountant,  
Teachers' Retirement System of the  
City of New York,  
40 Worth Street,  
New York, New York 10013

Dear Mr. Bessada,

Reference is made to your letter  
dated May 29, 1987.

After several inquiries I belatedly  
received my pension check for the month  
of May 1987.

I am unable, however, to cash this  
check, whose gross amount payable is  
less than the amount established by the  
Teachers' Retirement System Actuarial  
Report of March 31, 1987; because I am  
afraid that cashing such a check would  
imply my acceptance of a smaller

pension than originally established.  
Please advise me regarding disposition  
of this check.

Additionally, as you were previously  
notified, I require that the Teachers'  
Retirement System immediately send me a  
certified COPY of the complete record  
of my membership in the Teachers'  
Retirement System of the City of New  
York. (Membership # 00T611562; Pension  
# 069139-0).

Thank you for your cooperation.

Sincerely yours,

HARRY N. ZEMSKY  
3030 Emmons Avenue  
Brooklyn, New York 11235  
(718) 934-7358

TEACHERS' RETIREMENT SYSTEM  
THE CITY OF NEW YORK

VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

April 27, 1987

Mr. Harry Nathan Zemsky  
3030 Emmons Avenue  
Brooklyn, New York 11235  
Dear Mr. Zemsky:

Your application for retirement effective September 3, 1986 has been processed and you received your first retirement allowance check dated March 31, 1987.

After reviewing the calculation of your retirement allowance, we find that your Annuity Savings Fund reflects a deficit amounting to \$13,473.80 as a

result of the following charges to your  
Annuity Savings Fund:

BAL. AS AT 8/31/86                      \$39,493.30

LESS: LOAN BAL.

AS AT 8/31/86...\$28,773.02

LESS: EXCESS WITH-

DRAWAL 9/30/86...24,194.08

52,967.10

BALANCE (DEFICIT)                      \$13,473.80

Due to the above error, your retirement allowance will be adjusted and your Annuity Reserve Fund will be reduced by \$66.69 per month as of May 31, 1987.

The present deficit of \$13,473.80 plus the retirement allowance overpayment of \$66.69 monthly from the date of your retirement on September 3, 1986 to the date of the adjustment on April 30, 1987 amounting to \$529.07 leaves a total of \$14,002.87 which must be reimbursed.

Please mail us your check as soon as possible in the amount of \$14,002.87 made payable to the:

Comptroller of the City of New York,  
Custodian of the Funds of the Teachers' Retirement System.

If we do not hear from you by May 31, 1987, we will begin deducting the amount of \$190.00 per month from your monthly retirement allowance as of the June 1987 payroll until the full amount of \$14,002.87 is recovered.

Thank you for your cooperation in this matter.

Very truly yours,

/S/

Mounir Bessada

Chief Accountant

cc: Ms. Penny Taylor

TEACHERS' RETIREMENT SYSTEM  
THE CITY OF NEW YORK

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

May 29, 1987

#T 611562

Mr. Harry Nathan Zemsky  
3030 Emmons Avenue  
Brooklyn, New York 11235  
Dear Mr. Zemsky:

I am in receipt of your letter dated May 26, 1987 and your telegram dated May 27, 1987. Your letter and telegram indicate that you are disturbed about certain information forwarded to you from the Teachers' Retirement System but you do not specify the problem. I, therefore, cannot respond in a direct manner.

In reviewing our records, we found that we provided you with the correct figures which appear in my letter of April 27, 1987.

Insofar as allowing personal member records out of our safekeeping, I am sure you can appreciate the hazards of lost mail but I would be more than happy to meet with you at your convenience and discuss your records or provide you with any information necessary for your understanding of the matter.

Please call me at (212) 566-6673 to set up an appointment.

Very truly yours,

/S/

Mounir Bessada

Chief Accountant  
/



TEACHERS' RETIREMENT SYSTEM  
THE CITY OF NEW YORK

VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

June 16, 1987

Mr. Harry Nathan Zemsky  
3030 Emmons Avenue  
Brooklyn, New York 11235  
Dear Mr. Zemsky:

This is in reference to our previous communication informing you of a deficit amounting to \$14,002.87 which was a result of the withdrawal of excess monies from your account not taken into consideration in the calculation of your retirement allowance.

In accordance with a Resolution adopted at the Teacher's Retirement Board meeting of February 21, 1985, I am empowered to implement a reasonable

plan of repayment to be deducted from the member's retirement allowance when a bi-lateral agreement to recover monies due cannot be reached.

Therefore, this letter serves as notification that, beginning with your June 1987 retirement allowance check, we will be withholding approximately 10% of your gross monthly allowance which amounts to \$190.00 per month to be continued until the full amount of \$14,002.87 is recovered.

Sincerely,

/S/

Wallace F. Sullivan  
Executive Director

WFS:vrđ

cc:Mr. Mounir Bessada

TEACHERS' RETIREMENT SYSTEM  
THE CITY OF NEW YORK

VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

June 19, 1987

#R 69139

Harry Nathan Zemsky  
3030 Emmons Avenue  
Brooklyn, New York 11235  
Dear Mr. Zemsky:

I am in receipt of your letter dated  
June 15, 1987 and your Mailgram dated  
June 17, 1987.

Due to the withdrawal of your excess  
funds not taken into consideration in  
calculating your retirement allowance  
as explained in my letters dated April  
27, May 29 and June 16, 1987, your  
retirement allowance has been revised  
and your pension check does reflect the  
proper allowance due you.

Enclosed please find a copy of the  
Second Report of Actuary which reflects  
the corrected figures.

We regret any inconvenience this  
has caused you.

Very truly yours,

/S/

Mounir Bessada

Chief Accountant

MB:vrđ

Enc :

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x

Docket No: 86-7614  
86-7616  
86-7618

HARRY N. ZEMSKY,

Plaintiff-Appellant,

-V-

THE CITY OF NEW YORK, THE BOARD OF  
EDUCATION OF THE CITY OF NEW YORK,  
VICTOR VILAREAL, ALAN J. IRGANG, JOHN  
SISTI, ROBERT J. LEVENTHAL, PETER  
ROSENBERG, XAVIER FRANCIS RUGGIERO,  
LOFTUS NOVELTY AND MAGIC COMPANY,  
A CORPORATION, DOE ONE, DOE TWO,

Defendants-Appellees

-----x

APPEAL FROM THE UNITED STATES DISTRICT  
COURT

FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

Harry N. Zemsky, Pro Se  
3030 Emmons Avenue  
Brooklyn, New York  
11235 (718) 934-7358

I. ISSUES PRESENTED FOR REVIEW

- (a) The issuance of two orders in this case, June 27, 1986 and September 1, 1986, leads me to:
- (1) request the District Court to reconsider its orders, and,
  - (2) request the Appeals Court to review the orders of the District Court.

(b) I believe the District Court erred because it was misled by the Municipal Defendants, and by my inability to answer their motions for dismissal and/or stay of federal proceedings.

(c) I believe that Judge Branwell was not unsympathetic to my plight, but faced with my obvious inability to properly represent myself, the Court had no other recourse.

(d) My problems in the District Court included:

- (1) lack of legal knowledge, experience, and resources;
  - (2) chronic disabling illness;
- and

(3) the intensification of efforts by the Municipal Defendants to force me to discontinue this action have created new issues for the Court to consider. Accordingly, I have moved the Court for permission to include matters not presented in the District Court for consideration here.

## II. NATURE OF THE CASE

- (a) Defendant Vilareal is a former student at the Franklin D. Roosevelt High School: The following are employees of the New York City Board of



Education at the Franklin D. Roosevelt High School. Defendant Irgang is the Principal; Defendant Sisti is the Assistant Principal, Administration Defendant Leventhal is Assistant Principal, Supervision - Social Studies; Defendant Rosenberg is a Dean; Defendant Ruggerio is a Dean

- (b) This case began when defendant Vilareal twice threw liquid substances into plaintiff's eyes. After the second attack plaintiff filed a "Notice of Claim" with the defendant Board of Education for injuries to his eyes.

(c) Unknown to the plaintiff (at that time) on or about April 22, 1983, the Office of the New York City Comptroller called the attention of the Board of Education to my "NO ATTORNEY" claim. On or about April 28, 1983, the Board of Education called the attention of Defendant Irgang to my "NO ATTORNEY" claim.

(d) On May 2, 1983, plaintiff was summoned to a "conference" in Defendant Irgang's office where accompanied by abuse, ridicule, etc. this plaintiff was threatened that if he claimed that his eyes were bad, and if he was sick, plaintiff would be sent to the Medical Division and his teaching career ended.

(e) Subsequently for more than three years, the Municipal Defendants, and Defendant Vilareal, have conspired and acted to wrongfully injure and oppress the plaintiff to force him to end his litigation in these matters, and to falsify and destroy evidence about Defendant Vilareal's two attacks on the plaintiff.

III. INTENSIFICATION OF EFFORTS TO  
FORCE ME TO DISCONTINUE THIS  
ACTION

(a) On or about, and subsequent to May 15, 1986 a threat by a Municipal Defendant concerning this action was communicated to me.

- (b) On or about June 9, 1986 I received an annoying anonymous letter in the mail
- (c) On June 19, 1986 my car, parked near Franklin D. Roosevelt High School while at work, had three tires flattened (slashed).
- (d) On June 25, 1986 my car, parked near Franklin D. Roosevelt High School while at work, had its exhaust system almost totally demolished.
- (e) During the night of August 10-11, 1986, I observed an automobile standing in front of my car, with two males apparently examining my car. They abruptly jumped into their

vehicle and drove off, as a Police Department Patrol Car appeared.

(f) On the evening of August 19, 1986, my doorbell rang. Not having received a call on the building security system, I asked who was at the door. There was no answer. The door bell continued to ring, I again asked who was at the door. Again there was no answer. Suddenly, the persons who had been ringing my door bell, moved hurriedly to the stairway opposite my apartment door and ran down the stairs, as the elevator arrived on my floor and several persons and a barking dog stepped into the

corridor. When I opened my apartment door I noticed that the door bell fixture had been scratched by a pointed instrument.

(g) From may through September 1986. I received several annoying telephone calls from persons who refused to identify themselves. During the night of September 27-28, 1986, I received several telephone calls between 12:30 and 1:00 AM from an individual who refused to identify himself, whose comments included references to the "Board of Education."

(h) Because I have identified two Municipal Defendants in two of

these occurrences, I believe that the above noted events are related to my prosecution of this case.

(i) Deeply troubled by these events, I have placed evidence about them in a safety deposit box, should I be unable to continue my prosecution of this action.

(j) On June 26, 1986, I received six pieces of mail (three regular and three certified duplicate) from the Board of Education notifying me of my suspension and trial of charges for neglect of duty. The charges were false and apparently synchronized to

conflict with the hearing in  
District Court on June 27, 1986.

ADDITIONAL CAUSES OF ACTION  
CONTINUED TO ACCRUE

IV. COURSE OF PROCEEDINGS

(a) On April 14, 1986, Municipal  
Defendants submitted motions to  
the Court to:

- (1) dismiss "this action  
pursuant to Rule 12(b)(6)  
of the Federal Rules of  
Civil Procedure"; or,
- (2) "for an order staying all  
further federal proceedings  
in the above-captioned  
action pending disposition  
of plaintiff's action



presently before the  
Supreme Court of the State  
of New York"; and,

(3) "for such other and further  
relief as the Court deems  
just and proper"; and/or,

(4) "for an order allowing  
Municipal Defendants twenty  
(20) days in which to  
answer the amended  
complaint . . . pursuant to  
Rule 12(a) of the Federal  
Rules of Civil Procedure."

(b) I was unable to prepare and  
submit my answer. A hearing on  
the Municipal Defendants  
motions was held on June 27,  
1986.

## V. DISPOSITION IN LOWER COURT

Two orders were issued by the Court.

(1) The consolidated cases were administratively closed without prejudice to reinstatement to the active calendar upon application to the Court.

(2) ORDERED that civil actions numbers CV-86-0099 (HB), CV-86-0936 (HB), and CV-86-1437 (HB) be, and they hereby are, consolidated and it is further

ORDERED, Municipal Defendants' motion to dismiss the complaints herein with respect to plaintiff's claims pursuant to 42 U.S.C. sections 1981,

1985 and 1986 is granted and it is further

ORDERED that Municipal Defendants' motion to dismiss the complaints herein with respect to plaintiff's claims pursuant to 42 U.S.C. section 1983 is granted except to the extent that the complaints state claims, not barred by the statute of limitations, for violation of plaintiff's liberty interest in freedom from bodily injury and it is further

ORDERED that Municipal Defendant's motion to dismiss the complaints herein with respect to plaintiff's claims

pursuant to 42 U.S.C. section  
1983 for violation of  
plaintiff's liberty interest in  
freedom from bodily injury is  
denied and it is further

ORDERED that the complaints  
against the private parties are  
dismissed in their entirety and  
it it further

ORDERED that all federal  
proceedings with respect to the  
complaints herein are stayed  
pending disposition of  
plaintiff's state court action  
and it is further

ORDERED that the Clerk of the  
Court is directed to  
administratively close civil

actions, numbered CV-86-0099  
(HB), CV-86-0936 (HB), and  
CV-86-1437 (HB).

VI. PLAINTIFF'S ANSWER TO MUNICIPAL  
DEFENDANT'S MOTIONS

(a) Municipal Defendants'

"Affidavit in Support of Their  
Motions" contains statements  
that conflict with facts as  
alleged in the complaint; but  
is silent about other facts  
that are relevant to the issues  
Municipal Defendants raise.

Plaintiff hereby notes the  
misstatements and omissions of  
Municipal Defendants'  
"Affidavit", in accordance with  
the paragraphing therein.

Paragraph 2:

- \* On June 7, 1982, a liquid substance of undetermined composition was thrown into plaintiff's eyes by defendant Vilareal; on January 10, 1983, the same defendant, Vilareal, threw "disappearing ink" into plaintiff's eyes.
- \* Plaintiff has been unable to find the word "negligently" in the complaint.

Paragraph 4:

- \* "City of New York" was added to caption at the insistence of receiving clerk, who refused to accept it otherwise. On

June 26, 1985, (see paragraphs 15, 52, 53, 54 and 55 of the amended complaint) plaintiff learned that the City of new York was indeed an appropriate defendant!

\* Plaintiff was told that his grievance would not be heard under any circumstances and that he would be charged with insubordination and sent to the Medical Division if he pursued his efforts to obtain relief from the misconduct of the Municipal Defendants.

Paragraph 5:

- \* Plaintiff received no response to his demand for discovery, inspection and copying.

Paragraph 6:

- \* Summons served on September 24, 1985; complaint was served on October 13, 1985.
- \* Municipal Defendants maliciously refused to give him his wages on the last day of th school year. (Paragraph 34)
- \* Plaintiff was accosted by two intruders; one of whom was the defendant Vilareal. (Paragraphs 36 and 37)



Paragraphs

9 and 10:

- \* Will be responded to in plaintiff's answer to "Municipal Defendants' Memorandum of Law."

Paragraph 11:

- \* Complaint in paragraph 7 alleges that the injuries and losses caused the plaintiff by the Municipal Defendants were "the results of established and continuing policies and practices of the Board of Education of the City of New York and the city government of the City of New York;" and complaint in paragraph 71 alleges

that the mis- conduct of  
the Municipal Defendants  
was the "implementation of  
policies and practices  
followed by the defen-  
dants, the city government  
of the city of new York  
and the Board of Education  
of the City of New York,  
especially where the  
injured plaintiff is not  
represented by an  
attorney."

Paragraphs

13(?), 13(?),

14, 15 and 16:

\* Will be responded to in  
plaintiff's answer to  
"Municipal Defendant's  
Memorandum of Law."

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(b) Municipal Defendants'

"Memorandum of Law" also contains statements that conflict with the facts alleged in the complaint; but is silent about other facts that are relevant to the issues Municipal Defendants raise.

Plaintiff hereby notes the misstatements and omissions of Municipal Defendants'

"Memorandum", in accordance with the pagination therein.

Page 1:

\* Defendant Vilareal is a former student (graduated June 1983); no other student or former student is a defendant in this

action.

- \* United State  
Constitutional Amendments  
1, 4, 5, 6, 7, 8, 9 and 14  
are also listed in  
complaint as source of  
federal jurisdiction.
- \* Plaintiff has been unable  
to find the word  
negligence in his  
complaint.

Page 2:

- \* (Once again) Plaintiff has  
been unable to find the  
word negligence in his  
complaint.
- \* "undefined conspiracies" -  
Will be responded to in  
plaintiff's answer to  
"Municipal Defendants"  
APP.- 255 -

Memorandum of Law."

- \* "barred by ... statute of limitations"; and "claims ... arising under 1981, 1982, 1983, 1985, 1986" - Will be responded to in plaintiff's answer to "Municipal Defendants' Memorandum of Law."
- \* "stay of all ... federal proceedings ..." - Will be answered in plaintiff's answer to "Municipal Defendants' Memorandum of Law."

Page 3:

- \* Plaintiff has been unable to find the word "negligent" in his complaint.

- \* "unspecified conspiracies"
  - Will be responded to in plaintiff's answer to "Municipal Defendants' Memorandum of Law."

Page 4:

- \* Intruders, one of whom was the defendant Vilareal, accosted plaintiff in his classroom.
  - \* (Once again) Plaintiff has been unable to find the word "negligent" in his complaint.
  - \* "conspired with students in an unspecified manner"
    - Paragraph 13 of the complaint "conspired ... with defendant Vilareal ... to maliciously
- APP.- 257 -

conceal, suppress and  
falsify ..."; Paragraph 23  
of the complaint "acted  
... with the perpetrator  
of ... assault ... to  
conceal, suppress and  
falsify ... and to  
maliciously prepare and  
circulate false and  
defamatory reports ..."

\* (Paragraph 31) Would be  
"charged with  
insubordination and sent  
to the Medical Division."

Page 5:

\* Plaintiff has been unable  
to find the words  
"negligence" or  
"negligent" in his  
complaint.

- \* Municipal Defendants' comments about Section 1983 will be responded to in plaintiff's answer to "Municipal Defendants' Memorandum of Law."
- \* Municipal Defendants' "analysis" of plaintiff's allegations will be responded to in plaintiff's answer to "Municipal Defendants' Memorandum of Law."

Page 6:

- \* Plaintiff has been unable to find the word "negligence" in his complaint.
  - \* Municipal Defendants' "analysis" of plaintiff's
- APP.- 259 -



allegations will be  
responded to in  
plaintiff's answer to  
"Municipal Defendants'  
Memorandum of Law."

\* "pendent jurisdiction" -  
previously unknown to  
plaintiff; definition  
obtained: "power of a  
federal court to decide  
all relevant questions in  
a case, provided a  
substantial federal issue  
is involved at some  
point." Plaintiff, at  
this time, is not applying  
for such treatment, but  
asks Municipal Defendants  
why "pendent jurisdiction  
is unavailable in the  
instant case?"

\* "time-barred" (paragraphs "9" and "10") assertion by Municipal Defendants will be responded to in plaintiff's answer to "Municipal Defendants' Memorandum of Law."

Pages

7, 8, 9

and 10:

\* Municipal Defendants' "analysis" of plaintiff's allegations will be responded to in plaintiff's answer to "Municipal Defendants' Memorandum of Law."

Page 10:

\* The relationship of the Board of Education of the City of New York to the City of New York is greater than symbiotic; the Board is classified as a "non-Mayoral" agency, because the Mayor of the City of New York appoints only two of the seven members of the Board of Education, the remaining five members being appointed by the five Borough Presidents of the city's five boroughs (counties); the board's budget is part of the city's budget; etc.; etc. Despite this inseparable

relationship, the plaintiff did not make the City of New York a defendant until after June 26, 1985, when plaintiff learned of the integral and leading involvements of the Office of the Comptroller of the City of New York and the Office of the Corporation Counsel of the City of New York in the wrongful injuries and losses inflicted upon the plaintiff as alleged in the complaint. (See paragraph 15, 52, 53 54 and 55 of the complaint.)

Pages

11, 12,

13, 14,

15, 16,

and 17:

\*     Municipal Defendants  
      "Point II," "Point III"  
      and "Conclusion" will be  
      responded to in  
      plaintiff's answer to  
      "Municipal Defendants'  
      Memorandum of Law."

## VII.     PLAINTIFF'S MEMORANDUM OF LAW

### NO TIME-BARRED CAUSES OF ACTION

(a) Municipal Defendants objection  
    to paragraphs "9" and "10" as

time-barred is inappropriate.  
The attack on June 7, 1982 does  
not stand alone as a cause of  
action. I believe it may be  
considered a condition-  
precedent to the attack on  
January 10, 1983.

(b) Municipal Defendants must not  
be permitted to reap the  
benefits of their misconduct  
after the attack on June 7,  
1982.

(NOTE: The following  
provisions of the AGREEMENT  
BETWEEN THE BOARD OF EDUCATION  
AND THE UNITED FEDERATION OF  
TEACHERS.)

A. Assistance in Assault Cases

1. The principal shall report as soon as possible but within 24 hours to the Office of Legal Services and to the Director of School Safety that an assault upon a teacher has been reported to him. The principal shall investigate and file a complete report as soon as possible to the Office of Legal Services and to the Director of School Safety. The Full report shall be signed by the teacher to acknowledge that he has seen the report and he may append a statement to such report.

2. The Office of Legal Services shall inform the teacher immediately of his rights under the law and shall provide such information in a written document.

3. The Office of Legal Services shall notify the teacher of its readiness to assist the teacher.

This assistance is intended solely to apply to the criminal aspect of any case arising from such assault.

4. Should the Office of Legal Services fail to provide an attorney to



appear with the teacher in Family Court the Board will reimburse the teacher if he retains his own attorney for only one such appearance in an amount up to \$40.00

5. An assaulted employee who presses charges against his assailant shall have his days of court appearance designated as non-attendance days with pay.

6. The provisions of the 1982-83 Chancellor's Memorandum entitled "Assistance to Staff in

Matters Concerning  
Assaults" shall apply.

- (c) Defendant Vilareal,  
furthermore, misled and fooled  
his victim, the plaintiff,  
after the attack. He too, must  
not be permitted to reap the  
benefits of his misconduct.

ALLEGATIONS OF CONSPIRACY ARE NOT VAGUE  
OR CONCLUSORY

- (d) Allegations of conspiracy  
contained in the complaints are  
neither vague nor conclusory.  
They describe the overt acts of  
omission and commission by the  
Municipal Defendants in  
furtherance of their conspiracy  
against the plaintiff, joined

by the defendant Vilareal and an assailant known as Anthony Pascarella.

(e) Specific allegations of conspiracy are contained in paragraphs 4, 5, 6, 7, 10, 12, 13, 14, 15, 17, 21, 22, 23, 24, 27, 28, 29, 30, 31, 34, 36, 37, 29, 41, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 61, 68, 69, 70, 71, (86-99); and 73, 74, 75, 76, 77, 78, (86-1437).

(f) To apprehend the extent of the conspiracy, we need only consider the relationships among the conspirators:

Irgang, Principal

Sisti, Assistant  
Principal, Administration

Leventhal, Assistant  
Principal, Supervision

Rosenberg, Dean

Ruggerio, Dean

Vilareal, Student, Former Student

Pascarella, Student

(g) Appropriate here is the  
observation of the late Mr.

Justice Holmes, Jr. in "The Common Law" (first published in 1881) in discussing evil motives behind conspiracies, he notes "as, for instance, the removal of a teacher by a school board" could not be accomplished without a conspiracy.

VIII. PLAINTIFF-APPELLANT ASKS THE  
COURT TO:

- (a) order that claims upon which relief can be granted are stated in this complaint for violation of the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Fourteenth Amendments to the Constitution

of the United States; and also violations of Title 42 of the United States Code, Sections 1981, 1982, 1983, 1985 and 1986, against defendants City of New York, Board of Education of the City of New York; Victor Vilareal; Alan Irgang; John Sisti; Robert J. Leventhal; Peter Rosenberg; and Xavier Francis Ruggerio; and that

- (b) a claim upon which relief can be granted is stated against defendant Loftus Novelty and Magic Company, a corporation, under Title 28 of the United States Code, Section 1332(a)(1), and the allegations stated in paragraphs 63, 64, 65, 66 and 67 of this complaint; and that

(c) the stay against all federal proceedings be vacated; and that

(d) this case be remanded to the District Court for trial.

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Harry Zemsky, Pro Se  
3030 Emmons Avenue  
Brooklyn, New York 11235  
(718) 934-7358

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
HARRY N. ZEMSKY,

Plaintiff,

v.

THE CITY OF NEW YORK; THE BOARD OF  
EDUCATION OF THE CITY OF NEW YORK;  
VICTOR VILAREAL; ALAN IRGANG;  
JOHN SISTI; ROBERT J. LEVENTHAL;  
PETER ROSENBERG; XAVIER FRANCIS  
RUGGIERO; LOFTUS NOVELTY AND MAGIC  
COMPANY, A CORPORATION; DOE ONE;  
DOE TWO; ETC.; ET AL.

Defendants

-----x  
Index No. CV-86-2145

AMENDED COMPLAINT

RELATED COMPLAINTS

CV-86-0099

CV-86-0936

CV-86-1437

COMPLAINT

The Plaintiff, by Harry N. Zemsky, Pro  
Se, complaining of the defendants,  
alleges as follows:



- 1) Plaintiff, Harry N. Zemsky, is employed by the Board of Education of the City of New York as a teacher at the Franklin Delano Roosevelt High School, and is a resident of Kings County, in the City and State of New York.
- 2) Defendants are the city government of the City of New York, with its principal office at City Hall, New York, New York; the Board of Education of the City of New York, a public benefit corporation with its principal office at 110 Livingston Street, Brooklyn, New York; Victor Vilareal, who resides at 1322 - 44th Street in Brooklyn, New York; Alan Irgang, John Sisti, Robert J.

Leventhal, Peter Rosenberg and Xavier Francis Ruggiero, who are employed by the New York City Board of Education at the Franklin Delano Roosevelt High School, which is located at 5800-20th Avenue, Brooklyn, New York; and the Loftus Novelty and Magic Company, a corporation, which is located at 865 South 200 East, Salt Lake City, Utah. The identities of defendants Doe One, Doe Two, etc. are at present unknown.

- 3) The matters in controversy exclusive of costs, exceed \$25,000 (Twenty-Five Thousand Dollars).
- 4) This Court's jurisdiction is based upon the personal

injuries and property damages and losses caused the plaintiff by the defendants, the city government of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg and Xavier Francis Ruggiero, in violation of the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States; and also Title 42 of the United States Code, Sections 1981, 1982, 1983, 1985, 1986; and 28 U.S.C. 1343 and the financial and other support of the United States Government for the activities

and programs of these defendants; in that they individually and collectively, intentionally and maliciously, conspired and acted abusing the power of their offices and under color of law, to diminish, deny and deprive the plaintiff of rights, privileges and immunities granted to him by the Constitution and Laws of the United States and the State of New York without due process of law.

- 5) And that these defendants furthermore conspired and acted intentionally and maliciously to impede, deny and obstruct justice when the plaintiff sought to lawfully enforce his rights to due process of law

and equal protection of the laws, when these defendants knowingly prepared and disseminated false and inaccurate testimony and other evidence, and suppressed, withheld and destroyed material evidence in connection with litigation involving the plaintiff and his employer, in order to prejudice the plaintiff's chances of recovery in State Court by causing the Court to question plaintiff's veracity and likely cause the Court to view plaintiff in an unfavorable light.

- 6) And furthermore, that these defendants conspired and acted intentionally and maliciously, abusing the powers of their

respective offices and under color of law, to discriminate against, abuse, harass, oppress, punish and inflict undue injury and loss upon the plaintiff.

- 7) And that the injuries and losses caused the plaintiff by the defendants, the city government of the City of New York, the Board of Education of the City of New York, Victor Vilaréal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg and Xavier Francis Ruggiero, are the results of established and continuing policies and practices of the Board of Education of the City of New York and the City Government of

the City of New York to conceal from public knowledge official misconduct and mismanagement, and to deprive victims of such mismanagement and misconduct of compensation and reparation for the injuries and losses wrongfully inflicted upon them, especially when their victim is not represented by an attorney. Paragraphs 4, 5, 6 and 7 are realleged and hereby inserted and included in each of the causes of action included in this continuing complaint.

- 8) This Court's jurisdiction is also based upon the personal injuries and property damages and losses caused the Plaintiff by the Loftus Novelty and Magic

Company, a corporation whose principal office is located in Salt Lake City in the State of Utah, and is engaged in interstate commerce in Kings County in the State of New York. This complaint against the defendant Loftus does not allege any participation in the conspiracy described elsewhere in this complaint. The inclusion of the defendant Loftus is based solely on the allegations made in paragraphs 63, 64, 65, 66 and 67 of this complaint, and on 28 U.S.C. 1332(a)(1).

FIRST CAUSE OF ACTION

- 9) Plaintiff suffered personal



injuries on or about June 7, 1982, while teaching a class at the Franklin Delano Roosevelt High School, when the defendant, Victor Vilareal, a student at that time, threw a liquid substance into the plaintiff's eyes, causing injuries to the plaintiff's eyes and other bodily organs; and also causing plaintiff pain, loss of vision and emotional suffering.

- 10) Although duly notified about this assault, the defendants (the Board of Education of the City of New York, Alan Irgang, John Sisti and Peter Rosenberg) refused to admonish, discipline, restrain or warn the perpetrator; and also

refused to fulfill the duties required of them by law; and also refused to fulfill the obligations required by the collective bargaining agreement between defendant, the Board of Education of the City of New York, and the United Federation of Teachers; and also violated the employment contract between the plaintiff and his employer to safeguard and to refrain from intentionally endangering and injuring each other's person and property.

- 11) Plaintiff again suffered personal injuries on or about January 10, 1983, when the defendant, Victor Vilareal, for a second time, threw a liquid, presumably "disappearing ink"

into the plaintiff's eyes, causing and/or aggravating a glaucoma condition, and other injuries to plaintiff's eyes, including pain, loss of vision, conjunctivitis, iritis, "dry eye" and other disabilities and impairments of the eyes and other bodily organs; and also causing plaintiff severe emotional distress and suffering.

- 12) This defendant Vilareal, had injured the plaintiff in a prior similar incident, described in paragraph 9 of this complaint, and the refusal and failure by the defendants, the Board of Education of the City of New York, Alan Irgang, John Sisti and Peter Rosenberg,

to fulfill the duties and obligations required of them at that time, described in paragraph 10 of this complaint, encouraged further student misconduct and violence against the plaintiff, and caused the second assault by Victor Vilareal against the plaintiff, as described in paragraph 10 of this complaint.

#### SECOND CAUSE OF ACTION

- 13) On or about, and prior to, and subsequent to May 2, 1983, the defendants, the city government of the City of New York, the Board of Education of the City of New York, Alan Irgang, John Sisti, Robert J. Leventhal,

Peter Rosenberg and Xavier Francis Ruggiero, conspired and acted with the defendant Vilareal, who had previously committed two acts of violence upon the plaintiff described in paragraphs 9 and 11 of this complaint to maliciously conceal, suppress and falsify the true facts about these acts of violence against the defendant, by preparing a statement in which the January 10, 1984, attack on the plaintiff was falsely reported to be accidental. On October 3, 1984 (see paragraphs 36, 37 and 38 of this complaint), defendant Vilareal, acting at the direction of the Municipal Defendants, prepared a new

report about his attack on the plaintiff on January 10, 1983, in which he falsely stated that the ink used in his attack on the plaintiff struck the plaintiff's shirt, not the plaintiff's face and eyes, as had been previously reported and established.

- 14) The behavior and actions of the defendants, the city government of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg, and Xavier Francis Ruggiero, described in paragraph 13 of this complaint, wrongfully intentionally and with premeditation diminished and

removed responsibility and liability of the defendants, the city government of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg, and Xavier Francis Ruggiero, for the injuries inflicted upon the plaintiff, depriving the plaintiff of his rights, privileges and immunities in these matters; and causing the plaintiff further bodily injury; emotional and mental distress, pain and suffering; and damage to the plaintiff's professional reputation, standing and other property.

THIRD CAUSE OF ACTION

- 15) On or about, and prior to, and subsequent to April 22, 1983, representatives of the office of the Comptroller of the City of New York conspired and acted with the defendants (the city government of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg and Xavier Francis Ruggiero), to prepare and disseminate false reports about the violence wrongfully inflicted upon and resulting in injury to the plaintiff; to suppress and destroy official reports made by the plaintiff;



to subject plaintiff to undue abuse, harassment and intimidation; to conspire and act with perpetrators of violence against the plaintiff to evade liability for injuries and damage inflicted on the plaintiff, condoning and encouraging further violence against the plaintiff; and to deprive plaintiff of his rights to just reparation and compensation for the injuries and damages wrongfully inflicted upon the plaintiff; to obstruct plaintiff's ability to properly fulfill and perform his employment; to maliciously and wrongfully seek to end plaintiff's teaching career; and to obstruct and force

claimant to discontinue his efforts to obtain justice in litigation by the claimant against the New York City Board of Education.

- 16) These intentional and malicious actions and behavior wrongfully caused and/or aggravated conjunctivitis, glaucoma, iritis and other injuries to claimant's eyes, causing pain and loss of vision; and also wrongfully caused and/or aggravated injuries and illnesses to claimant's ear, nose and throat, and cardiovascular, digestive, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury to these bodily

functions and organs; and also wrongfully caused damages, injury and loss to claimant's professional standing, reputation and other property; and also wrongfully caused claimant extreme emotional and mental distress, pain and suffering; and obstructed and denied claimant's efforts to obtain equitable relief and justice.

#### FOURTH CAUSE OF ACTION

- 17) On or about, and prior to, and subsequent to, May 2, 1983, plaintiff suffered personal injury when he was summoned to a conference in the principal's office of the Franklin Delano

Roosevelt High School, in the presence of defendants Irgang and Leventhal, at which he was maliciously subjected to undue abuse, defamation, duress, harassment, ridicule, derision, intimidation and threats to end his teaching career in connection with the injuries wrongfully inflicted on the plaintiff described in paragraphs 9 and 11 of this complaint, in order to force the plaintiff to end his efforts seeking relief, compensation and reparation for the injuries wrongfully inflicted on him.

- 18) The intentionally wrongful behavior and actions by the defendants (the city government

of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg and Xavier Francis Ruggiero) described in paragraph 17 of this complaint, caused plaintiff undue emotional stress, and caused and/or aggravated iritis and glaucoma conditions and caused and/or aggravated other injuries to plaintiff's eyes and other bodily organs; and caused the plaintiff extreme emotional distress, pain, anguish and suffering; and wrongfully caused damage, injury and loss to plaintiff's professional reputation, standing and other

property, and violated  
plaintiff's civil rights.

FIFTH CAUSE OF ACTION

- 19) Plaintiff suffered personal injury on or about, and subsequent to December 13, 1983, at the Franklin Delano Roosevelt High School when he was struck in the head by a hard object thrown at him by a student, previously unknown to the plaintiff, who was later identified as Anthony Pascarella. Plaintiff suffered stunning, severe pain in the head, followed by headache and neck and chest pains later that day and evening.

- 20) The intruder-assailant, identified in paragraph 19 of this complaint, attempted to flee the scene of the incident, but was apprehended by a school security officer. The assailant refused to identify himself at the scene and was removed to the Dean's office.
- 21) Although the defendants, the Board of Education of the City of New York, Alan Irgang, John Sisti, Peter Rosenberg and Xavier Francis Ruggiero, were duly notified about this incident they refused to fulfill their duties and obligations as described in paragraphs 10 and 12 of this complaint, thereby condoning and encouraging further student

misconduct, violence and intimidation against the plaintiff.

- 22) Plaintiff also suffered injury and loss when the assault described in paragraphs 19, 20 and 21 of this complaint, was discussed at the a conference between the United Federation of Teachers Chapter Executive Committee and the defendants at school on or about December 20, 1983. Members of the Chapter Executive Committee were critical of the defendants for refusing to follow proper and established procedures regarding this incident. The defendants responded with false, abusive, and malicious statements about the plaintiff's



character and credibility,  
slandering and defaming the  
plaintiff thereby.

- 23) Furthermore, the defendants,  
the Board of Education of the  
City of New York, Alan Irgang,  
John Sisti, Peter  
Rosenberg, Xavier Francis  
Ruggiero, acted together and  
with the perpetrator of the  
assault described in paragraphs  
19 and 20 of this complaint to  
conceal, suppress and falsify  
the true facts about this  
assault; and to maliciously  
prepare and circulate false and  
defamatory reports about this  
incident.

- 24) The behavior and actions of the  
defendants, the Board of  
Education of the City of New

York, Alan Irgang, John Sisti, Peter Rosenberg, Xavier Francis Ruggiero, and the perpetrator of the attack described in paragraph 23 of this complaint, intentionally and maliciously diminished and removed the responsibility and liability of the defendants and the perpetrator for the attack and injuries inflicted upon the plaintiff, thereby maliciously defaming and depriving the plaintiff of his rights in this matter; and intentionally violated the plaintiff's civil and professional rights, and encouraged further student misconduct and acts of violence and intimidation against the plaintiff.

25) Plaintiff also suffered personal injury when the misconduct of the defendants, the Board of Education of the City of New York, Alan Irgang, John Sisti, Peter Rosenberg, Xavier Francis Ruggiero, described in paragraphs 19, 20, 21, 22, 23 and 24 of this complaint, caused severe emotional, mental and bodily distress, and caused and/or aggravated a glaucoma condition and other injuries and illnesses of the cardiovascular, digestive, nervous and respiratory systems and other bodily organs, causing pain, dysfunction, impairments and disabilities of these bodily functions and

organs; and also caused plaintiff extreme and severe emotional and mental distress, pain and suffering.

- 26) Defendants', the Board of Education of the City of New York, Alan Irgang, John Sisti, Peter Rosenberg, Xavier Francis Ruggiero, misconduct, described in paragraphs 19, 20, 21, 22, 23 and 24 of this complaint, also caused damage, injury and loss to plaintiff's professional reputation, standing and other property.

#### SIXTH CAUSE OF ACTION

- 27) Plaintiff suffered personal injury and loss, on or about, and prior to, and subsequent to

February 1, 1984, and on or about and prior to February 3, 1984, at the Franklin Delano Roosevelt High School in connection with a grievance instituted by the plaintiff pursuant to the collective bargaining agreement between the defendant, the Board of Education of the City of New York, and the United Federation of Teachers, seeking equitable relief from continuing and multiplying unfair and discriminatory practices; violations of the collective bargaining agreement between the defendant Board of Education and the United Federation of Teachers; and destructive supervision and

abuse, by the defendants, the Board of Education of the City of New York, Alan Irgang, John Sisti and Robert J. Leventhal.

- 28) Plaintiff's grievance, described in paragraph 24 of this complaint, was caused by the misconduct of the defendants named in Paragraph 27 above, for imposing upon the plaintiff improper, unfair, abusive and destructive burdens, through improper and unfair work assignments and schedules, in violation of the collective bargaining agreement of the defendant Board of Education and the United Federation of Teachers.

- 29) Continuing paragraphs 27 and 28 of this complaint, the

defendants maliciously placed improper, unfair, abusive and destructive burdens upon the plaintiff, and denied the plaintiff equal and fair access to available school resources, necessary for the proper fulfillment of the plaintiff's professional obligations and responsibilities.

30) Paragraphs 27, 28 and 29 of this complaint are continued in that the defendants maliciously subjected the plaintiff to undue, improper, unfair, and destructive abuse, duress, harassment and intimidation.

31) The defendants informed the plaintiff that his grievances described in paragraphs 27, 28, 29 and 30 of this complaint

would "not be heard under any circumstances" and that the plaintiff "would be charged with insubordination and sent to the Medical Division" if the plaintiff pursued his efforts to obtain equitable relief from the misconduct of the defendants at the school.

- 32) The severe emotional and bodily distress caused by the malicious misconduct of the defendants at the Franklin Delano Roosevelt High School described in paragraphs 27, 28, 29, 30 and 31 of this complaint, caused and/or aggravated injuries and illnesses to the claimant's eyes, and also caused and/or aggravated injuries and illness



of other bodily organs and functions causing pain, dysfunction, impairments and disabilities of these bodily functions and organs; and also caused plaintiff extreme emotional and mental distress, pain and suffering.

- 33) Furthermore the intentional misconduct of the defendants described in paragraphs 27, 28, 29, 30, 31 and 32 of this complaint, violated plaintiff's civil and professional rights and subjected plaintiff to undue duress and harassment, causing damage, injury and loss to plaintiff's professional reputation, standing and other property rights.

SEVENTH CAUSE OF ACTION

- 34) On or about, and subsequent to June 27, 1984, plaintiff suffered personal injuries and property damage when the defendants, the Board of Education of the City of New York, Alan Irgang, John Sisti and Peter Rosenberg, maliciously and with intent to cause wrongful injury, and to impair and obstruct plaintiff's efforts to obtain justice and compensation and reparation for injuries and losses previously described in this complaint, refused to give him his wages for services previously performed, which were payable and which the plaintiff

rightfully sought to obtain on June 27, 1984. Plaintiff suffered further injury and loss when the defendant Alan Irgang prepared and circulated a letter falsely stating that the plaintiff had "neglected to take" his pay on the last day of the school year.

- 35) The malicious misconduct of the defendants alleged in paragraph 34 of this complaint wrongfully caused and/or aggravated glaucoma and iritis conditions and other injuries to plaintiff's eyes; and also wrongfully caused and or aggravated injuries and illnesses of the plaintiff's cardio-vascular, digestive, nervous and respiratory system

and other bodily organs,  
causing pain and dysfunction  
of, and injury to these bodily  
functions and organs; and also  
wrongfully caused damage,  
injury and loss to plaintiff's  
professional standing,  
reputation and other property;  
and also wrongfully caused  
plaintiff undue and severe  
emotional and mental distress,  
pain and suffering.

EIGHTH CAUSE OF ACTION

- 36) On or about, and subsequent to,  
October 3, 1984, plaintiff  
suffered wrongful injury, when  
the defendants the Board of  
Education of the City of New  
York, Alan Irgang, John Sisti,

Robert J. Leventhal, Peter Rosenberg, and Xavier Francis Ruggiero, enabled or acted with two non-student intruders to accost the plaintiff in his classroom at the school. One of these intruders, Victor Vilareal, a defendant in this complaint, while a student at the school, had on two prior occasions violently inflicted severe and wrongful injury on the plaintiff; and following these incidents, had acted at the behest of, and with the other defendants, the city government of the City of New York, the Board of Education of the City of New York, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg,

Xavier Francis Ruggiero, to suppress, conceal and falsify the facts and evidence of these assaults in order to evade responsibility and liability therefore, and to diminish and deprive the plaintiff of his rights in these matters; and to obstruct justice, litigation about which was then, and currently is, in progress. (See paragraph 13 of this complaint)

- 37) The intruders' presence, comments and demeanor subjected the plaintiff to undue and wrongful emotional stress and duress, causing him to feel harassed, intimidated and threatened.

38) The allegations described in paragraphs 36 and 37 of this complaint wrongfully caused and/or aggravated injuries and illnesses to plaintiff's eyes, cardiovascular, digestive, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injuries to these bodily functions and organs; and also caused damage, injury and loss to plaintiff's professional standing and other property; and also wrongfully caused plaintiff undue and severe emotional and mental distress, pain and suffering.

NINTH CAUSE OF ACTION

- 39) On or about, and subsequent to October 31, 1984, plaintiff suffered wrongful injury and loss when he was repeatedly subjected to undue, and malicious and discriminatory acts of abuse, defamation, duress, embarrassment, ridicule, harassment and intimidation, and repeatedly encountered malicious failure and refusal to properly and equitably perform and fulfill the duties and responsibilities of their office and employment in matters involving the plaintiff, by the defendants the Board of Education of the City of New York, Alan Irgang,



John Sisti and Robert J. Leventhal, who maliciously fostered and encouraged contempt and disrespect towards the plaintiff by students, teachers, and other persons; obstructed plaintiff's efforts to perform and fulfill his professional duties and responsibilities; and sought thereby to maliciously end plaintiff's teaching career.

- 40) The malicious actions and conduct of the defendants, the Board of Education of the City of New York, Alan Irgang, John Sisti and Robert J. Leventhal, alleged in paragraph 39 wrongfully caused and/or aggravated injuries and illnesses to plaintiff's eyes,

cardiovascular, digestive,  
nervous and respiratory systems  
and other bodily organs,  
causing pain, dysfunction and  
injury to these bodily  
functions and organs; and also  
wrongfully caused damage,  
injury and loss to plaintiff's  
professional standing,  
reputation and other property;  
and also wrongfully caused  
plaintiff severe emotional and  
mental distress, pain and  
suffering.

TENTH CAUSE OF ACTION

- 41) On or about, prior to, and  
subsequent to, February 1,  
1985, plaintiff suffered  
wrongful injury and loss as a

result of the conduct, and actions of the defendants the City of New York, the Board of Education of the City of New York, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg, Xavier Francis Ruggiero, at the Franklin Delano Roosevelt High School, when he was subjected to undue and unfair abuse, duress, harassment, threats and intimidation; including discriminatory and malicious unduly destructive administrative and supervisory actions and practices, and refusal to return plaintiff's professional property, and other violations of plaintiff's civil and professional rights,

which unfairly and wrongfully overburdened and obstructed plaintiff's efforts to perform and fulfill his employment responsibilities, and which were intended to wrongfully and maliciously terminate plaintiff's teaching career.

- 42) The allegations described in paragraph 41 of this complaint wrongfully caused and/or aggravated illnesses and injuries to plaintiff's eyes, cardiovascular, digestive, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury to these bodily functions and organs; and also wrongfully caused damage, injury and loss to plaintiff's

professional standing,  
reputation and other property;  
and also wrongfully caused  
plaintiff severe emotional and  
mental distress, pain and  
suffering.

#### ELEVENTH CAUSE OF ACTION

43) Plaintiff suffered injury when  
he was struck in the eyes,  
face, mouth and left ear by a  
stream of liquid of  
undetermined composition,  
coming from what appeared to be  
a pistol aimed at the plaintiff  
by an as yet unidentified  
perpetrator, who had opened the  
door to plaintiff's classroom,  
on June 11, 1985.

44) Door used by the perpetrator

was not locked to prevent such an incident, because it could not be opened from the inside; locking this door to prevent entrance from the corridor could result in a dangerous situation should rapid exit from the room be required. Requests for the repair of this defect had previously been made by the plaintiff.

- 45) Plaintiff's injuries were further caused and/or aggravated by the malicious actions and conduct of the defendants, the city government of the City of New York, the Board of Education of the City of New York, Alan Irgang, John Sisti, Robert J. Leventhal and Peter Rosenberg, whose

unjustified, malicious and discriminatory efforts to unduly injure the plaintiff with an unsatisfactory service rating for medically certified absences, intimidated the plaintiff into continuing to perform his duties without interruption, reporting for work on subsequent days, despite his injuries, and wrongfully caused and/or aggravated plaintiff's injuries and illness by exposing the plaintiff to further infection and injury; and interfered with plaintiff's efforts, and impaired plaintiff's ability, to obtain and take appropriate therapeutic measures to treat his injuries and prevent

further pathogenesis and injury.

46) Malicious misconduct by the defendants, the city government of the City of New York, the Board of Education of the City of New York, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg and Xavier Francis Ruggiero, contributed to this assault, in that they refused to properly protect and prevent violence against the plaintiff; and did, in fact, repeatedly and maliciously condone and encourage violence against the plaintiff.

47) Furthermore, the defendants wrongfully and maliciously interfered with plaintiff's report of injury, and failed to properly process plaintiff's



report of injury, and sought thereby to prepare and circulate false reports about this incident.

- 48) The allegations contained in paragraphs 40, 41, 42, 43, and 47 of this complaint wrongfully caused and/or aggravated conjunctivitis, chalazion, glaucoma, iritis and other injuries to claimant's eyes, causing pain and loss of vision; and also wrongfully caused and/or aggravated injuries and illnesses to claimant's ear, nose and throat, and cardio-vascular, digestive, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury to these

bodily functions and organs,  
and also wrongfully caused  
damage, injury and loss to  
claimant's professional  
standing, reputation and other  
property; and also wrongfully  
caused claimant severe  
emotional and mental distress,  
pain and suffering.

TWELFTH CAUSE OF ACTION

- 49) Plaintiff realleges the  
allegations made in paragraphs  
1 through 48 of this complaint,  
and alleges that the many and  
repeated acts of abuse,  
defamation, discrimination,  
harassment, intimidation,  
threats and other misconduct  
directed by the defendant and

its representatives at the plaintiff, described in this complaint, were and continue to be malicious acts of reprisal and retaliation, part of a conspiracy intended to obstruct justice and to wrongfully cause the termination of the plaintiff's efforts to obtain equitable relief, reparation and compensation for the injuries and losses which the defendants, the city government of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg and Xavier Francis Ruggiero, have wrongfully caused the plaintiff to suffer.

50) Inasmuch as the injuries and losses wrongfully caused the plaintiff were inflicted under color of law, the plaintiff incorporates herein the allegations made in paragraphs 1 through 49 of this complaint and further alleges that the repeated acts of malicious misconduct by the defendants, the city government of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg, and Xavier Francis Ruggiero, and the damages, injuries and losses caused the plaintiff thereby, were, did and are intended to deprive the

plaintiff of life, livelihood and property without due process of law; and furthermore, were intended to deny the plaintiff equal protection of the laws, and to obstruct plaintiff's efforts to obtain justice.

- 51) Plaintiff therefore alleges that the defendants, whose wrongful actions are described in paragraphs 1 through 50 of this complaint, have been and continue to be, in violation of the 14th Amendment to the Constitution of the United States, in the causes of action described in this complaint.

THIRTEENTH CAUSE OF ACTION

52) On or about June 26, 1985, plaintiff learned of the existence of numerous documents which provided evidence of the gross and malicious misconduct of defendants, the city government of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg and Xavier Francis Ruggiero, during the years 1983, 1984 and 1985, in which the defendants conspired and acted together to maliciously prepare and circulate false, misleading and defamatory statements and reports about the plaintiff,

and matters described in the complaint.

53) At the same time, the plaintiff also learned that these false, misleading and defamatory statements and reports had been prepared for the use of, and at the direction of the Office of the Comptroller of the City of New York, and the Office of the Corporation Counsel of the City of New York.

54) Too, these false, misleading and defamatory statements and reports had been reproduced and circulated in order to prejudice, obstruct and prevent the plaintiff from obtaining equitable relief, reparation and compensation for the injuries and damages described

in this complaint in a court of law; by falsely and maliciously impugning plaintiff's integrity and veracity, and therefore likely cause the court to view the plaintiff and his grievances in an unfavorable light.

- 55) Furthermore, the plaintiff discovered that a number of official reports submitted by the plaintiff to his employer and its representatives at the school were missing and, should these reports not reappear, must be presumed to have been destroyed. Plaintiff further asserts that the failure by the defendants to safeguard these reports, and make them available for inspection, reproduction and submission as evidence in



court, was malicious and intended to obstruct and prevent plaintiff from obtaining justice in the matters at issue in this complaint.

- 56) Plaintiff therefore alleges that the misconduct of the defendants described in paragraphs 52, 53, 54 and 55 above, wrongfully caused and/or aggravated injuries and illnesses to claimant's cardiovascular, digestive, gastrointestinal, genitourinary, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury, and also wrongfully caused damage, injury and loss to claimant's professional

standing, reputation and other property, and also wrongfully caused claimant extreme emotional and mental distress, pain and suffering; and also obstructed and denied claimant's efforts to obtain equitable relief and justice.

FOURTEENTH CAUSE OF ACTION

- 57) On or, and subsequent, September 11, 1985, plaintiff was assaulted by a student, John Rosas. This attack was duly reported to the school administration. The defendants, the Board of Education of the City of New York, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg,

refused to follow proper procedure; instead they maliciously misrepresented and condoned the circumstances of this attack, although they were fully aware that this misconduct would likely encourage, even incite, further acts of disruption and violence against the plaintiff in that class; which subsequently did occur on a scale and intensity so great as to severely impede and interfere with plaintiff's efforts to teach and fulfill his employment responsibilities in that class; while the response of the defendants, to the plaintiff's efforts to create a proper learning atmosphere in that class, was

to encourage continued student misconduct by abusing and harassing the plaintiff, and condoning disruptive student misconduct.

- 58) Furthermore, on or about November 21, 1985, the most disruptive and dangerous student misconduct witnessed by the plaintiff as both student and teacher, occurred when two students, who, despite repeated requests to the defendants by the plaintiff, that these students be appropriately disciplined for repeated acts of disruptive and violent misconduct, had not been appropriately disciplined or admonished, brought into and set-off a noxious, odor-

producing device; while another student was apprehended by the plaintiff with an incendiary smoke-producing device in his hand. The defendants once again failed and refused to properly discipline these students; and subsequently, as students throughout the school learned of this incident, and the reaction of the defendants to it, the plaintiff noted an increase of misconduct among students in his other classes.

- 59) The misconduct of the defendants as described in paragraphs, 57 and 58 was malicious and intended to obstruct and destroy plaintiff's ability to properly do his job; to harass and frustrate him, and to

wrongfully force the termination of plaintiff's teaching career, by endangering both the plaintiff and his students.

- 60) Plaintiff therefore alleges that the misconduct of the defendants described in paragraphs 57, 58 and 59 above, wrongfully caused and/or aggravated injuries and illnesses to claimant's cardiovascular, digestive, gastrointestinal, genitourinary, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury, and also wrongfully caused damage, injury and loss to claimant's professional standing, reputation and other

property, and also wrongfully caused claimant extreme emotional and mental distress, pain and suffering; and also obstructed and denied claimant's efforts to obtain equitable relief and justice.

FIFTEENTH CAUSE OF ACTION

- 61) On or about, prior to, and subsequent to November 22, 1985, plaintiff suffered wrongful injury and damage when he was subjected to malicious and discriminatory abuse and harassment by the defendant, Robert J. Leventhal, who maliciously, unfairly and falsely characterized, interfered with and sabotaged

the plaintiff's teaching.

- 62) Plaintiff therefore alleges that the misconduct of the defendant described in paragraph 61 above, wrongfully caused and/or aggravated injuries and illnesses to claimant's cardiovascular, digestive, gastrointestinal, genitourinary, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury, and also wrongfully caused damage, injury and loss to claimant's professional standing, reputation and other property, and also wrongfully caused claimant extreme emotional and mental distress, pain and suffering; and also obstructed



and denied claimant's efforts to obtain equitable relief and justice.

SIXTEENTH CAUSE OF ACTION

- 63) Plaintiff suffered personal injuries on or about January 10, 1983, when a fluid solution (presumably "Disappearing Ink") from a container manufactured, distributed and sold by the Loftus Novelty and Magic Company was discharged and emptied into plaintiff's eyes by defendant Vilareal, causing and/or aggravating a glaucoma condition, and other injuries to plaintiff's eyes, including pain, loss of vision, conjunctivitis, iritis and other

disabilities and impairments of plaintiff's eyes and other bodily organs; and also causing plaintiff extreme emotional distress and suffering and property damage.

- 64) The "disappearing ink" container was not properly labeled. The product was clearly intended for mischievous use, and the manufacturer had a duty to properly inform and warn the user against the products destructive and dangerous use. Had the product been properly labeled the incident on January 10, 1983 may have been prevented.
- 65) The defendant was evasive and misleading to requests for information and assistance in

the diagnosis and treatment of plaintiff's injuries. Had the defendant properly fulfilled its duty in this respect, the course of plaintiff's injuries, disease and disability may have been less destructive.

- 66) The substance itself was more, and unnecessarily, potent and dangerous than similar products.
- 67) Plaintiff therefore alleges that the misconduct of the defendants described in paragraphs 63, 64, 65 and 66 above, wrongfully caused and/or aggravated injuries and illnesses to claimant's cardiovascular, digestive, gastrointestinal, genitourinary, nervous and respiratory systems and other bodily organs,

causing pain, dysfunction and injury, and also wrongfully caused damage, injury and loss to claimant's professional standing, reputation and other property, and also wrongfully caused claimant extreme emotional and mental distress, pain and suffering; and also obstructed and denied claimant's efforts to obtain equitable relief and justice.

SEVENTEENTH CAUSE OF ACTION

- 68) Plaintiff notes that defendants, the city government of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J.

Leventhal, Peter Rosenberg and Xavier Francis Ruggiero, conspired and acted with malice to deprive the plaintiff of federal rights, privileges and immunities under color of law, and to inflict cruel and unusual punishment upon the plaintiff for their individual benefit and profit.

- 69) That the defendants, the city government of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg and Xavier Francis Ruggiero, conspired to harass and defame the plaintiff in order to induce him to give up substantial federal rights.

70) That the defendants, the city government of the City of New York, the Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg and Xavier Francis Ruggiero, refused plaintiff's requests and demands for reports and records, in order to delay and obstruct litigation, and thereby cause evidence to turn stale and material facts to fade in the minds of potential witnesses, making litigation more difficult, expensive and likely less successful.

71) That the misconduct of the defendants, the city government of the City of New York, the

Board of Education of the City of New York, Victor Vilareal, Alan Irgang, John Sisti, Robert J. Leventhal, Peter Rosenberg and Xavier Francis Ruggiero, was intentional, and deliberate, and the implementation of policies and practices followed by defendants, the city government of the City of New York and the Board of Education of the City of New York, especially where the injured plaintiff is not represented by an attorney.

- 72) Plaintiff therefore alleges that the misconduct of the defendants described in paragraphs 68, 69, 70, and 71 above, wrongfully caused and/or aggravated injuries and

illnesses to claimant's cardiovascular, digestive, gastrointestinal, genitourinary, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury, and also wrongfully caused damage, injury and loss to claimant's professional standing, reputation and other property, and also wrongfully caused claimant extreme emotional and mental distress, pain and suffering; and also obstructed and denied claimant's efforts to obtain equitable relief and justice.

EIGHTEENTH CAUSE OF ACTION

73) On or about June 26, 1985,



plaintiff learned about the existence of a document, relating to the incident described in paragraphs 11 and 12, and apparently prepared by defendant Peter Rosenberg, who thereby defamed and libeled the plaintiff, by knowingly and maliciously making and/or repeating and circulating false reports about this incident. Plaintiff realleges and hereby incorporates paragraphs 4, 5, 6, 7, 9 through 18; 49 through 56; and 68 through 72 of this complaint in this Eighteenth Cause of Action.

NINETEENTH CAUSE OF ACTION

74) On or about June 26, 1985, plaintiff learned about the existence of a document, relating to the incident described in paragraphs 19 through 26 of this complaint, and signed by the defendant John Sisti, whose comments defamed and libeled the plaintiff by knowingly and maliciously making and/or repeating and circulating false reports about this incident. Plaintiff realleges and hereby incorporates paragraphs 4, 5, 6, 7; 13 through 26; 49 through 56; and 68 through 72 of this complaint in this Nineteenth Cause of Action.

TWENTIETH CAUSE OF ACTION

- 75) On or about June 26, 1985, plaintiff learned about the existence of a document concerning several reports of injury made by the plaintiff, including those described in paragraphs 9 through 12 and 19 through 26 of this complaint, which upon information and belief of the plaintiff, was prepared and circulated by one or more of the municipal defendants, who thereby defamed and libeled the plaintiff by knowingly and maliciously making and/or repeating and circulating false reports about those incidents, and the reports made by the plaintiff

about them. Plaintiff realleges and hereby incorporates paragraphs 4, 5, 6, 7; 9 through 26; 49 through 56; and 68 through 72 of this complaint in this Twentieth Cause of Action.

TWENTY-FIRST CAUSE OF ACTION

- 76) On or about June 28, 1985, plaintiff learned about the existence of a document relating to a report of injury made by the plaintiff on or about March 21, 1985, and signed by the defendant Alan Irgang, whose comments therein defamed and libeled the plaintiff by knowingly and maliciously making and/or

repeating and circulating a false report about the incident. Plaintiff realleges and hereby incorporates paragraphs 4, 5, 6, 7; 9 through 26; 49 through 56; and 68 through 72 of this complaint in this Twenty-First Cause of Action.

TWENTY-SECOND CAUSE OF ACTION

- 77) On or about June 26, 1985, plaintiff learned about the existence of a document dated March 29, 1985, and apparently prepared by the defendant Alan Irgang, who thereby defamed and libeled the plaintiff by knowingly and maliciously making and/or reporting and

circulating false statements about reports of injury made by the plaintiff. Plaintiff realleges and hereby incorporates paragraphs 4, 5, 6, 7; 9 through 26; 49 through 56; and 68 through 72 of this complaint in this Twenty-Second Cause of Action.

#### TWENTY-THIRD CAUSE OF ACTION

- 78) Plaintiff suffered wrongful injury and loss on or about, prior to, and subsequent to, June 19, 1985, when he received a maliciously inspired unsatisfactory service rating for the school year 1984-1985, based, so the rating officer, defendant Irgang stated, upon

"the number and pattern of your absences."

- 79) With the exception of four school days absence for religious observance (for which pay was deducted), the plaintiff had been medically certified as incapacitated for school duties for each of his absences during the school year 1984-1985. Each medically certified absence was "paid for" by a deduction from the plaintiff's "sick bank," earned and accumulated over a period of more than twenty years, and held in reserve by the plaintiff should illness incapacitate him for school duties.

- 80) This novel and discriminatory action by the defendants,

punishing the plaintiff for medically certified absences is, among other things, an unlawful effort by the defendant, the Board of Education of the City of New York, to evade its contractual obligation to allow the plaintiff to draw upon his Cumulative Absence Reserve without penalty, and to wrongfully force the plaintiff to choose between absence without pay, or end his teaching career.

- 81) Furthermore, most (in fact probably all) of plaintiff's absences (and latenesses) during the school year 1984-1985, were the result of illnesses and injuries incurred and/or aggravated "in line of duty", (or were a consequence of the



malicious misconduct of the municipal defendants, described throughout this complaint), about which defendant Irgang had been notified, and therefore entitled the plaintiff to have these absences "paid for" by the defendant, the Board of Education of the City of New York, without charge to plaintiff's Cumulative Absence Reserve. But the plaintiff was afraid, and therefore unable, to assert his rightful claim in this matter, because he had been threatened by the defendant Irgang, as early as May 2, 1983, that his (plaintiff's) teaching career would be ended if he made such a claim. Furthermore, Municipal defendants obstructed

and prevented plaintiff from making an administrative appeal in this matter.

- 82) Plaintiff realleges and hereby incorporates paragraphs 4,5,6, 7,9,10,11,12; 19 through 26; 45 through 56; 68 through 72 and 78, 79, 80 and 81 of this complaint in this Twenty-Third Cause of action.

TWENTY-FOURTH CAUSE OF ACTION

- 83) On or about, prior to and subsequent to December 16, 1986, plaintiff suffered wrongful injury and loss when he was subjected to malicious, unfair, discriminatory duress and harassment by a supervisor, Robert J. Leventhal, when this

supervisor interfered with,  
sabotaged and unfairly and  
falsely characterized  
plaintiff's work effort; and  
furthermore maliciously,  
unfairly and improperly denied  
and prevented the plaintiff  
access and use of school and  
departmental resources and  
equipment needed by the  
plaintiff to properly perform  
his work.

- 84) Allegations described in  
paragraph 83 above include  
wrongfully caused and/or  
aggravated injuries to  
plaintiff's eyes, causing pain  
and loss of vision; also  
wrongfully caused and/or  
aggravated injuries and  
illnesses to plaintiff's

cardiovascular, digestive,  
gastrointestinal, genitourinary,  
nervous and respiratory systems  
and other bodily organs, causing  
pain, dysfunction and injury;  
and also wrongfully caused  
damage, injury and loss to  
plaintiff's professional  
standing, reputation and other  
property; and also wrongfully  
caused plaintiff extreme  
emotional and mental distress,  
pain and suffering; and also  
obstructed and denied  
plaintiff's efforts to obtain  
equitable relief and justice.

TWENTY-FIFTH CAUSE OF ACTION

85) On or about, and prior to and

subsequent to January 8, 1986, plaintiff suffered wrongful injury and loss when representatives of the New York City Board of Education, discriminatorily and maliciously, abused and violated administrative process and official discretion by interfering with and otherwise improperly responding to plaintiff's application for a sabbatical leave of absence to which he was entitled; subjecting plaintiff to undue abuse, duress and intimidation; and violating plaintiff's civil and employment rights.

- 86) Allegations described in paragraph 85 above include wrongfully caused and/or aggravated injuries and

illnesses to plaintiff's cardiovascular, digestive, gastrointestinal, genitourinary, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury; and also wrongfully caused damage, injury and loss to plaintiff's professional standing, reputation and other property; and also wrongfully caused plaintiff extreme emotional and mental distress, pain and suffering; and also obstructed and denied plaintiff's efforts to obtain equitable relief and justice.

TWENTY-SIXTH CAUSE OF ACTION

87) On or about February 3, 1986, and February 4, 1986, plaintiff suffered wrongful injury and loss when representatives of the New York City Board of Education, discriminatorily and maliciously, abused and violated administrative process, official discretion and proper standards of medical practice, when plaintiff's application for a sabbatical leave of absence to which he was clearly entitled was denied, and subjected plaintiff to undue abuse, duress and harassment therewith; and violated plaintiff's civil and employment rights.

88) Allegations described in paragraph 87 above include wrongfully caused and/or

aggravated injuries to plaintiff's eyes, causing pain and loss of vision; also wrongfully caused and/or aggravated injuries and illnesses to plaintiff's cardiovascular, digestive, gastrointestinal, genitourinary, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury; and also wrongfully caused damage, injury and loss to plaintiff's professional standing, reputation and other property; and also wrongfully caused plaintiff extreme emotional and mental distress, pain and suffering; and also obstructed and denied



plaintiff's efforts to obtain equitable relief and justice.

TWENTY-SEVENTH CAUSE OF ACTION

- 89) On or about, and prior to and subsequent to February 24, 1986, plaintiff suffered wrongful injury and loss when he was subjected to discriminatory duress and harassment by representatives of the New York City Board of Education at the Franklin Delano Roosevelt High School, Alan Irgang and Robert J. Leventhal, when they maliciously, falsely and unfairly characterized plaintiff's teaching performance, as part of a continuing conspiracy to unlawfully punish the claimant

and interfere with claimant's efforts to obtain justice in litigation against the New York City Board of Education.

- 90) Allegations described in paragraph 87 above include wrongfully caused and/or aggravated injuries to plaintiff's eyes, causing pain and loss of vision; also wrongfully caused and/or aggravated injuries and illnesses to plaintiff's cardiovascular, digestive, gastrointestinal, genitourinary, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury; and also wrongfully caused damage, injury and loss to plaintiff's professional

standing, reputation and other property; and also wrongfully caused plaintiff extreme emotional and mental distress, pain and suffering; and also obstructed and denied plaintiff's efforts to obtain equitable relief and justice.

TWENTY-EIGHTH CAUSE OF ACTION

- 91) On or about, and prior to, and subsequent to March 18, 1986, plaintiff suffered wrongful injury and loss when he was subjected to malicious and undue duress and harassment, by the New York City Board of Education and its representatives at the Franklin Delano Roosevelt High School and

elsewhere, who continued their acts of reprisal, intimidation and conspiracy to injure the plaintiff, and to wrongfully end plaintiff's teaching career, and to obstruct and improperly force the termination of plaintiff's efforts to obtain justice in litigation for injuries and losses wrongfully caused plaintiff by the New York City Board of Education and its representatives, when the plaintiff was improperly summoned to an unfair "hearing", at which the plaintiff was notified that his "removal from service" was being recommended, and he was ordered to report to the "Medical Division" . . .

"to determine" his "fitness to continue teaching."

- 92) Allegations described in paragraph 91 above include wrongfully caused and/or aggravated injuries to plaintiff's eyes, causing pain and loss of vision; also wrongfully caused and/or aggravated injuries and illnesses to plaintiff's cardiovascular, digestive, gastrointestinal, genitourinary, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury; and also wrongfully caused damage, injury and loss to plaintiff's professional standing, reputation and other property; and also wrongfully

caused plaintiff extreme emotional and mental distress, pain and suffering; and also obstructed and denied plaintiff's efforts to obtain relief and justice; and deprived plaintiff's rights, privileges and immunities under the constitutions and laws of the United States and the State of New York.

TWENTY-NINTH CAUSE OF ACTION

- 93) On or about, and prior to, and subsequent to April 9, 1986, plaintiff suffered wrongful injury and loss when he was subjected to malicious and undue duress, harassment, abuse and humiliation, by the New

York City Board of Education and its representatives, who continued their acts of reprisal, intimidation and conspiracy to wrongfully injure the plaintiff, and to wrongfully end plaintiff's teaching career, and to obstruct and improperly force the termination of plaintiff's efforts to obtain justice in litigation for injuries and losses wrongfully cause plaintiff by the New York City Board of Education and its representatives, when the claimant was forced to submit to an unfair and malicious "medical examination."

- 94) Allegations described in paragraph 93 above include wrongfully caused and/or

aggravated injuries to plaintiff's eyes, causing pain and loss of vision; also wrongfully caused and/or aggravated injuries and illnesses to plaintiff's cardiovascular, digestive, gastrointestinal, genitourinary, nervous and respiratory systems and other bodily organs, causing pain, dysfunction and injury; and also wrongfully caused damage, injury and loss to plaintiff's professional standing, reputation and other property; and also wrongfully caused plaintiff extreme emotional and mental distress, pain and suffering; and also obstructed and denied plaintiff's efforts to obtain



relief and justice; and  
deprived plaintiff's rights,  
privileges and immunities  
protected by the constitu-  
tions and laws of the United  
States and the State of New  
York.

THIRTIETH CAUSE OF ACTION

- 95) Plaintiff suffered wrongful  
injury and loss on or about,  
prior to, and subsequent to,  
June 17, 1986, when he received  
an unsatisfactory service  
rating for the school year  
1985-1986, based, so the rating  
officer, defendant Irgang  
stated, upon "the number and  
pattern of your absences."

96) With the exception of four school days absence for religious observance (for which pay was deducted), the plaintiff had been medically certified as incapacitated for school duties for most (really all) of his absences during the school year 1985-86. Each medically certified absence was "paid for" by a deduction from the plaintiff's "sick bank," earned and accumulated over a period of more than twenty years, and held in reserve by the plaintiff should illness incapacitate him for school duties.

97) This novel and discriminatory action by the defendants, punishing the plaintiff for

medically certified absences is, among other things, an unlawful effort by the defendant, the Board of Education of the City of New York, to evade its contractual obligation to allow the plaintiff to draw upon his Cumulative Absence Reserve without penalty.

- 98) Furthermore, most (in fact, probably all) of plaintiff's absences (and latenesses) during the school year 1985-1986, were the result of illnesses and injuries incurred and/or aggravated "in line of duty", (or were a consequence of the malicious misconduct of the municipal defendants, described throughout this

complaint), about which defendant Irgang had been notified, and therefore entitled the plaintiff to have these absences "paid for" by the defendant, the Board of Education of the City of New York, without charge to plaintiff's Cumulative Absence Reserve. But the plaintiff was afraid, and therefore unable, to assert his rightful claim in this matter, because he had been threatened by the defendant Irgang, as early as May 2, 1983, that his (plaintiff's) teaching career would be ended if he made such a claim.

- 99) Plaintiff realleges and hereby incorporates paragraphs 4, 5, 6, 7, 9, 10, 11, 12; 19 through

26; 49 through 56; 68 through 72 and 95, 96, 97 and 98 of this complaint in this Thirtieth Cause of Action.

100) Plaintiff realleges herein paragraphs 1 through 99 of this complaint and notes that the plaintiff's injuries, illnesses, pain and suffering caused and/or aggravated by the defendant, have existed not only in the the past, but will continue to exist in the future, with probable further deterioration and injury.

101) Plaintiff incorporates herein paragraphs 1 through 100 of this complaint and notes that many of the medications and therapies for the injuries and illnesses caused the plaintiff

by the defendants in this complaint, are in, and of, themselves pathogenic.

102) Plaintiff realleges herein paragraphs 1 through 101 of this complaint and demands that computation of damages for personal injuries in this complaint include damages for past and future illnesses, injuries, pain and suffering which arise from the illnesses, injuries, pain and suffering inflicted on the plaintiff for which the defendants bear responsibility and liability.

103) Plaintiff incorporates herein the allegations made in paragraphs 1 through 102 of this complaint, and states that by reason of the aforesaid

wrongful acts of the defendants, which directly and proximately caused the injuries, illnesses, pain, suffering and losses of the plaintiff, described in this complaint, the plaintiff has suffered damages as follows:

GENERAL DAMAGES: for past and future personal injury and illnesses, pain and suffering, loss of earnings and damage to personal and professional reputation, and damage to property rights; and SPECIAL DAMAGES: medical expenses, past and future, the plaintiff demands judgment and payment from the defendants as follows:

The City of New York

\$12,000,000.00 for each Cause  
of Action;

The Board of Education of the  
City of New York \$12,000,000.00  
for each Cause of Action;

Victor Vilareal \$1,000,000.00  
for each Cause of Action;

Alan Irgang \$2,000,000.00 for  
each Cause of Action;

John Sisti \$1,000,000.00 for  
each Cause of Action;

Robert J. Leventhal  
\$1,000,000.00 for each Cause of  
Action;

Peter Rosenberg \$500,000.00 for  
each Cause of Action;

Xavier Francis Ruggiero  
\$250,000.00 for each Cause of  
Action;



Loftus Novelty and Magic Co.  
\$1,000,000.00 for each Cause of  
Action;

PUNITIVE AND EXEMPLARY

DAMAGES: The repeated acts of  
misconduct by the defendants  
have been intentional and so  
outrageous, that additional  
punitive and exemplary damages  
are justified and warranted.  
Therefore, the plaintiff  
demands additional judgment and  
payment from the defendants as  
follows:

The City of New York  
\$36,000,000.00 for each Cause  
of Action;

The Board of Education of the  
City of New York \$36,000,000.00  
for each Cause of Action;

Victor Vilareal \$3,000,000.00  
for each Cause of Action;

Alan Irgang \$6,000,000.00 for  
each Cause of Action;

John Sisti \$3,000,000.00 for  
each Cause of Action;

Robert J. Leventhal  
\$3,000,000.00 for each Cause of  
Action;

Peter Rosenberg \$1,500,000.00  
for each Cause of Action;

Xavier Francis Ruggiero  
\$750,000.00 for each Cause of  
Action;

Loftus Novelty and Magic Co.  
\$3,000,000.00 for each Cause of  
Action;

WHEREFORE, plaintiff demands  
judgment against the defendants  
as follows:

The City of New York  
\$48,000,000.00 for each Cause  
of Action;

The Board of Education of the  
City of New York \$48,000,000.00  
for each Cause of Action;

Victor Vilareal \$4,000,000.00  
for each Cause of Action;

Alan Irgang \$8,000,000.00 for  
each Cause of Action;

John Sisti \$4,000,000.00 for  
each Cause of Action;

Robert J. Leventhal  
\$4,000,000.00 for each Cause of  
Action;

Peter Rosenberg \$2,000,000.00  
for each Cause of Action;

Xavier Francis Ruggiero

\$1,000,000.00 for each Cause of  
Action;

Loftus Novelty and Magic Co.

\$4,000,000.00 for each Cause of  
Action;

with interest thereon from the  
10th day of January 1983

together with the costs and  
disbursements of this action.

A JURY TRIAL IS DEMANDED

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HARRY N. ZEMSKY, Pro Se  
3030 Emmons Avenue  
Brooklyn, New York 11235  
(718) 934-7358

303 Emmons Avenue  
Brooklyn, New York 11235

October 7, 1987

Clerk,  
Supreme Court of the United States  
1 First Street, N.E.  
Washington, D.C. 20543

Re: Harry N. Zensky v. City of New York  
et al. No. A-192

Dear Sir:

- 1) I am requesting an additional extension of time within which to file a petition for a writ of certiorari to and including October 14, 1987.
- 2) While seeking guidance from your office (on Friday, October 2) regarding my filing, I learned that the Appendix to my petition must be typed in pica type on 6-1/8 x 9-1/4

inch pages, not copied on 8-1/2 x 11 inch paper as I was doing.

3) The typing of almost 400 additional pages has prevented me from submitting my papers today, Wednesday, October 7, 1987, as I had planned; because, although Mr. Justice Marshall's order extended my time for filing to and including October 9, 1987, my observance of the Jewish religious holiday of Succoth on October 8 and 9, precludes such activity by me, or others acting on my behalf.

4) Defendants will not be unfairly prejudiced by the extension. I am serving copies of this request on opposing counsel:

- a) New York City Corporation  
Counsel  
100 Church Street  
New York, New York

and

- b) Joseph W. Conklin, Esq.  
60 Broad Street  
New York, New York

Sincerely,

---

HARRY N. ZEMSKY, Pro Se  
3030 Emmons Avenue  
Brooklyn, New York 11235  
(718) 934-7358

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